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No. 06- 06-100

IN THE

Supreme Court of the United States

GEICO GENERAL INSURANCE COMPANY,
GEICO INDEMNITY COMPANY, and
GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Petitioners,

v.

AJENE EDO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fair Credit Reporting Act ("FCRA" or the "Act") requires a user of consumer credit information to notify a consumer when the consumer has been treated adversely on the basis of his or her credit information. To enforce this requirement, Congress provided two tiers of civil remedies. Under § 1681o of the Act, if a consumer shows that a user's failure to send an adverse-action notice was negligent, the consumer is entitled to recover actual damages. But under § 1681n of the Act, if the consumer makes a higher showing and proves that the user's failure to send an adverse-action notice was "willful," the consumer is entitled to recover statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages.

A conflict exists between the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, and the Third and (now) Ninth Circuits over the mens rea required for a "willful" violation of FCRA. Separating itself from any other circuit to have decided the issue and compounding the circuit split, the Ninth Circuit held that a company may be deemed to have acted recklessly—and thereby willfully under the Act—if the company relied, even in good faith, upon an interpretation of the Act that a court later determines to be "unreasonable[]," "implausible," "creative," or "untenable," even if that interpretation was derived from a legal opinion that the company sought for the very purpose of ensuring compliance with the law.

Two questions are presented:

1. Whether the Ninth Circuit's construction of "willfully" under § 1681n of FCRA impermissibly permits a finding of willfulness to be based upon nothing more than negligence, gross negligence, or a completely good-faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law, rather than requiring proof of a defendant's knowledge that its conduct violated FCRA or, at a minimum, recklessness in its subjective form?

2. Whether the Ninth Circuit improperly expanded § 1681m of FCRA by holding that an "adverse action" has occurred and notice is required thereunder, even when a consumer's credit information has had either no impact or a favorable impact on the rates and terms of the insurance that would otherwise have been offered or provided?

LIST OF PARTIES

Petitioners GEICO General Insurance Company, GEICO Indemnity Company, and Government Employees Insurance Company were defendants in the district court proceedings and appellees in the court of appeals proceedings. GEICO Casualty Company was a defendant in the district court proceedings, but was not a party in the court of appeals proceedings and thus is not a party to this petition.

Respondent, Ajene Edo, was a plaintiff in the district court proceedings and the appellant in the court of appeals proceedings.

In the court of appeals, this case was consolidated for purposes of oral argument with another proceeding in which Jason Reynolds was the appellant and Hartford Fire Insurance Company was the appellee.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of Government Employees Insurance Company and GEICO Indemnity Company is GEICO Corporation. GEICO Corporation is an indirect subsidiary of Berkshire Hathaway. There is no publicly held corporation that owns ten percent or more of the stock in Government Employees Insurance Company or GEICO Indemnity Company.

The parent corporation of GEICO General Insurance Company is Government Employees Insurance Company. There is no publicly held corporation that owns ten percent or more of the stock in GEICO General Insurance Company.

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The first opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Reynolds v. Hartford Financial Services Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005). The first opinion was withdrawn, and a second opinion was issued on October 3, 2005, was amended on October 24, 2005, and is reported at 426 F.3d 1020 (9th Cir. 2005). The second opinion was also withdrawn, and a third opinion was issued on January 25, 2006, and is reported at 435 F.3d 1081 (9th Cir. 2006).[1] The Ninth Circuit reversed the February 23, 2004 decision of the United States District Court for the District of Oregon, which is reported at *Edo v. GEICO Casualty Co.*, No. 02-678-BR, 2004 U.S. Dist. LEXIS 28522 (D. Or. Feb. 23, 2004).[2]

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was entered on January 25, 2006.[3] Petitioners timely filed a Petition for Rehearing *En Banc*, which was denied on April 20, 2006.[4]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

STATUTES INVOLVED

Sections 602-603 and 615-617 of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681a, and 1681m-1681o (2000), are set out in the Appendix at 51a. All references to the sections of FCRA or "the Act" are references to the *codified* sections of FCRA, which are contained in Title 15 of the United States Code.

STATEMENT OF THE CASE

Long after FCRA[5] was enacted in 1970, insurance companies began to widely use consumer credit information to help price their insurance policies. Insurance companies frequently rely on a consumer's "insurance score," which is derived in whole or in part from the consumer's credit information, to help predict the risk that the consumer will

[1](Petitioners' Appendix (hereafter "App.") at 1a.)
[2](App. at 37a.)
[3](App. at 1a.)
[4](App. at 49a.)
[5]15 U.S.C. §§ 1681-1681t (2000).

suffer a loss. FCRA allows insurance companies to use consumer credit information in this manner, but requires insurance companies to notify a consumer when the company treats the consumer "adversely" or "unfavorably" "on the basis of" the consumer's credit information. If an insurance company negligently fails to comply with this requirement, the company can be held liable for actual damages. Upon a higher showing of "willful" noncompliance, the company can be held liable for statutory damages between $100 and $1,000 (in lieu of actual damages) and punitive damages.

In the thirty-five years since FCRA was enacted, no federal appellate court has interpreted the terms "adversely," "adverse action," "unfavorably," or "on the basis of" in the insurance context – until now. And in the past thirty-five years, although the circuits have adopted conflicting interpretations of what constitutes a "willful" violation of FCRA, no circuit has adopted an "unreasonableness" standard for willfulness – until now. The decisions of district courts in the Ninth and other circuits reflect the confusion over the correct standard and confirm that the Ninth Circuit's holding involves recurring legal issues that have substantial importance, not just to the parties, but to insurance companies and consumers all across America as well.

In December of 2000, Respondent, Ajene Edo ("Edo"), called and requested a rate quote for automobile insurance from the GEICO family of companies.[6] GEICO requested Edo's insurance score from Trans Union. GEICO then offered Edo a policy with GEICO Indemnity Company, which he accepted. Because GEICO determined that Edo had received the exact same rate and terms for insurance that he would have received if his insurance score had not been ordered or used in any way, GEICO concluded that Edo had not suffered any "adverse action" as that term is defined in FCRA[7] and, therefore, did not send Edo an adverse-action notice.[8]

At the core of this putative class action is Edo's claim that GEICO willfully violated FCRA by failing to send him an

[6]Petitioners Government Employees Insurance Company, GEICO General Insurance Company, and GEICO Indemnity Company are collectively referred to herein as GEICO.

[7](Excerpts of Record in the Ninth Circuit (hereafter "ER") at 55, ¶ 11.)

[8](ER at 10, ¶ 10; 23, ¶ 8.)

adverse-action notice as required by § 1681m of the Act. On motion for summary judgment, the district court dismissed Edo's claims, concluding in relevant part—as GEICO had concluded—that Edo had not, in fact, suffered any adverse action and that no adverse-action notice was required because Edo had received the same rate and terms from the GEICO family of companies that he would have received if GEICO had not considered his credit information.

In an opinion authored by Judge Stephen Reinhardt, a three-judge panel of the Ninth Circuit reversed. The Ninth Circuit held, in part, that an adverse action occurs and notice is required under FCRA, not only when a consumer's credit information has an adverse or unfavorable impact on the insurance rates or terms that would otherwise have been offered or provided, but also when a consumer's credit information, if considered, would have had a more favorable impact on those rates or terms if that credit information had been more favorable.[9] Under this reasoning, an applicant for automobile insurance that is offered a discount because of her above-average credit information nonetheless would have suffered an "adverse action" at the hands of the insurer if an even better insurance score would have qualified her for an even greater discount.

The Ninth Circuit then turned to the issue of whether GEICO had "willfully" violated FCRA and should be punished with punitive damages. After acknowledging a circuit split over the mens rea required for a "willful" violation of FCRA, the Ninth Circuit purported to adopt the minority view and held that a company acts willfully if it acts in "reckless disregard" of whether its policy or action violates the rights of consumers. But the Ninth Circuit further defined its "reckless disregard" standard by holding that a company may be deemed to have acted recklessly if the company relies, *even in good faith*, on an interpretation of FCRA that is later determined to be "unreasonable[]," "implausible," "creative," or "untenable"—*even if that interpretation was derived from a legal opinion sought for the very purpose of ensuring compliance*

[9] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006). (App. at 20a-21a.)

with the law. Accordingly, the Ninth Circuit remanded in part for a determination of whether GEICO's or its counsel's interpretations of FCRA were so unreasonable or implausible as to permit a finding of willfulness on that basis alone, *even though the district court interpreted FCRA in the very same way in the proceedings below.*

1. Notice requirements under FCRA. FCRA authorizes insurance companies to use credit information as an underwriting tool, but it requires insurance companies using credit information to notify a consumer when the consumer's credit information has had an adverse impact on the rates or terms provided.[10] Section 1681m of FCRA provides in part: "If any person takes any *adverse action* with respect to any consumer that is *based in whole or in part on any information contained in a consumer report*, the person shall . . . provide oral, written, or electronic notice of the adverse action to the consumer . . . ."[11] In connection with insurance, FCRA defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other *adverse or unfavorable change* in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."[12]

If an insurance company fails to comply with § 1681m's requirements, the company may be subject to liability under one of FCRA's two tiers of civil liability. Section 1681o of the Act allows a plaintiff to recover actual damages for "negligent" violations, while § 1681n punishes "willful" violations by allowing a plaintiff to recover statutory damages between $100 and $1,000 (in lieu of actual damages), and punitive damages.[13] FCRA does not define the term "willfully," and this Court has never granted certiorari to define it under the Act.

2. Proceedings in the district court. Edo filed this putative class action in the United States District Court for the District of Oregon, invoking jurisdiction under FCRA[14] and

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[10]15 U.S.C. § 1681m(a)(1).

[11]*Id.* (emphasis added).

[12]15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

[13]*Compare* 15 U.S.C. § 1681o, *with* 15 U.S.C. § 1681n.

[14]*See* 28 U.S.C. § 1331 (2000).

alleging that he had suffered an adverse action because he had been offered insurance from GEICO Indemnity at a rate "less favorable" than the rate that would have been offered if he had had the highest, most-favorable insurance score. Although he seeks no actual damages, Edo alleges that GEICO's purported violations of FCRA were willful and that GEICO should be required to pay statutory damages of $100 to $1,000 per class member, and punitive damages.[15]

After discovery, GEICO moved for summary judgment, arguing in part that no GEICO entity could have violated FCRA because none of the GEICO entities had taken any adverse action against Edo. As an alternative basis for summary judgment, GEICO argued that Edo could not establish the required element of willfulness under § 1681n. GEICO argued that it had used its best efforts to comply with FCRA at all times and that, because the issue of what constitutes an "adverse action" in the context of insurance underwriting was an issue of first impression, it could not serve as the basis for finding a willful violation of FCRA.[16]

On February 23, 2004, without reaching GEICO's willfulness argument, the district court granted GEICO's Motion for Summary Judgment and dismissed Edo's claims against each of the GEICO entities, concluding that Edo had not, in fact, suffered any adverse action.[17] The district court dismissed Edo's claim against GEICO Indemnity because the court concluded that Edo had not suffered any adverse action on the basis of his credit information: "Plaintiff admits the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."[18] Edo's claim against Government Employees Insurance Company was dismissed because Edo, who was not a government employee or in the military, was "not eligible for insurance coverage from Government Employees regardless of his

[15](*See* ER at 3-5, 81 Ans. to Interrog. 6.)

[16](Supplemental Excerpts of Record in the Ninth Circuit (hereinafter "SER") at 307-13.)

[17]*Edo v. GEICO Cas. Co.*, No. 02-678-BR, 2004 U.S. Dist. LEXIS 28522 (D. Or. Feb. 23, 2004). (App. at 37a.)

[18]*Id.* at *12. (App. at 46a.)

consumer score because Government Employees offers insurance coverage only to government employees or military personnel."[19] Edo's claims against the other GEICO entities were also dismissed.[20]

Pursuant to 28 U.S.C. § 1291, Edo filed his Notice of Appeal.[21]

3. Proceedings in the Ninth Circuit. On August 4, 2005, the Ninth Circuit, with one member of the panel dissenting, issued its first opinion, holding in relevant part that an adverse action has occurred and notice is required under § 1681m of the Act "whenever a consumer pays a higher rate because his credit rating is less than the top potential score," even when that rate is lower than or equal to the rate he would have otherwise paid if his credit rating had not been considered.[22] The court then held that Edo had suffered an adverse action and that notice was required under FCRA because Edo had not received the very best rate that the GEICO family of companies had to offer.[23] After acknowledging a circuit split among the Third, Sixth, and Eighth Circuits regarding the mens rea required for a "willful" violation of FCRA, the panel majority purported to adopt a "reckless disregard" standard. But the panel majority then held, *sua sponte*, that GEICO's lawyer's interpretations of FCRA – interpretations adopted by the district court when it granted GEICO's Motion for Summary Judgment – were "unreasonable" and, consequently, that GEICO had "willfully" violated FCRA as a matter of law.[24] GEICO filed a Petition for Rehearing and Rehearing *En Banc*, arguing in part that the panel majority had adopted and applied a negligence standard for willfulness. GEICO also challenged the Ninth Circuit's interpretation of what constitutes an "adverse action" under the Act. Several amici curiae submitted briefs in support of GEICO's petition.

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[19] *Id.* at *10. (App. at 44a.)

[20] *Id.* at *10-13. (App. at 45a-47a.) Edo did not appeal the district court's dismissal of GEICO Casualty.

[21] (ER at 255.)

[22] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 416 F.3d 1097 (9th Cir. 2005).

[23] *See id.* at 1108-09.

[24] *Id.* at 1113-16.

On October 24, 2005, the Ninth Circuit withdrew its first opinion and issued a second opinion.[25] While the court did not change its interpretation of what constitutes an "adverse action" under § 1681m of the Act, the panel majority wordsmithed the willfulness section of its first opinion by replacing all references to the word "unreasonable" with the word "implausible" (which also means unreasonable[26]) or "untenable" or some other variation of these adjectives.[27] But the panel majority stood by its prior holding that GEICO had willfully violated FCRA as a matter of law because its lawyer's interpretations of the Act, with which the district court agreed, were "implausible" and "untenable."[28] GEICO then filed its First Amended Petition for Rehearing *En Banc*, arguing in part that the panel majority's restated willfulness standard focused not on a company's mens rea, good faith, or lack thereof, but, rather, on the correctness or incorrectness of the company's lawyer's interpretations of FCRA. Again, GEICO challenged the Ninth Circuit's interpretation of what constitutes an "adverse action." And once again, several amici curiae submitted briefs in support of GEICO's petition.

On January 25, 2006, the Ninth Circuit withdrew its second opinion, and issued its third and ultimately final opinion that is the subject of this Petition for a Writ of Certiorari.[29] As in the first two versions of its opinion, the panel again held in part that Edo had suffered an adverse action and that notice was required under FCRA.[30] The court again acknowledged the circuit split regarding the standard for determining willfulness, but abandoned the panel majority's prior *sua sponte* holding that GEICO had willfully violated FCRA as a matter of law. Nonetheless, the panel maintained its holding that a company may be found to have acted recklessly and thereby willfully, even if it diligently attempted to comply with FCRA

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[25]*Reynolds v. Hartford Fin. Servs. Group, Inc.*, 426 F.3d 1020 (9th Cir. 2005).

[26]*See* Merriam-Webster's Collegiate Dictionary 950 (11th ed. 2004).

[27]*Reynolds*, 426 F.3d at 1036-40.

[28]*Id.*

[29]*Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081 (9th Cir. 2006). (App. at 1a.)

[30]*Id.* at 1092-93. (App. at 20a-21a.)

but relied in good faith on an interpretation of the Act that is later determined to be "unreasonable[]," "implausible," "creative," or "untenable." The court then remanded for a determination of whether GEICO had acted willfully under this standard.[31] GEICO filed its Second Amended Petition for Rehearing *En Banc*, arguing in part that the panel has once again adopted, in effect, a negligence standard for willfulness, and has collapsed the statutory distinction between negligence and willfulness intended by Congress. Yet again, several amici curiae submitted briefs in support of GEICO's petition. The Ninth Circuit denied GEICO's petition on April 20, 2006.

REASONS FOR GRANTING THE PETITION

This case brings to this Court the perfect opportunity to resolve a clear conflict among at least the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits and to establish uniformity as to what constitutes a "willful" violation of FCRA that would entitle a plaintiff to statutory and punitive damages. Although this Court has granted certiorari on numerous other occasions to define the term "willfully" as it is used in other federal statutory schemes, the Court has never granted certiorari to define the term as it is used in FCRA. While purporting to adopt a "reckless disregard" standard for determining willfulness under FCRA, the Ninth Circuit went further and held that a company may be deemed to have acted willfully and thereby subjected to massive statutory and punitive damages if the company relied, *even in good faith*, on an interpretation of the Act that is later determined to be "unreasonable[]," "implausible," "creative," or "untenable" – *even if that interpretation was derived from a legal opinion that the company sought for the purpose of ensuring compliance with the law*. In effect, the Ninth Circuit has adopted the very same willfulness standard that this Court rejected in another context because it would "permit a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect assumption" that the company's policies and actions were in compliance with the law.[32] Given the confusion created by the existing circuit split and now the

[31] *Id.* at 1097-99. (App. at 31a-34a.)

[32] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

Ninth Circuit's new willfulness standard, which blurs if not collapses the two-tiered statutory distinction between negligence and willfulness, the issue is urgently in need of this Court's authoritative voice. There are class-action proceedings[33] and Multi-District Litigation proceedings pending[34] all across the country wherein plaintiffs have alleged willful violations of FCRA and seek literally *billions* of dollars in statutory and punitive damages. Thus, in addition to resolving the conflict among the circuits, granting review at this time will promote the efficient management of these other cases that are currently before the federal courts.

The willfulness standard adopted by the Ninth Circuit is all the more significant because the Ninth Circuit has also radically expanded FCRA's substantive requirements. Prior to the Ninth Circuit's opinion in this case, the question of what constitutes an "adverse action" in the insurance context had not been addressed by any federal appellate court since the relevant statutory provisions were enacted in 1970. Now the Ninth Circuit's holding that an adverse action occurs whenever a consumer is not afforded an even greater discount because his insurance score is less than the top potential score effectively requires insurance companies to send adverse-action notices to the vast majority of consumers because few consumers have the top potential score. If the vast majority of consumers that apply for insurance will now *always* receive adverse-action notices, then Congress's stated purpose for enacting the notice requirement—namely, to notify consumers

[33]*See, e.g., Yeagley v. Wells Fargo & Co.*, No. 05-CV-03403 (N.D. Cal. filed Aug. 22, 2005); *Hogan v. PMI Mortgage Ins. Co.*, No. 05-CV-03851 (N.D. Cal. filed Sept. 23, 2005); *Luther v. 1-800-Bar-None*, No. 05-CV-04026 (N.D. Cal. filed Oct. 5, 2005); *Murray v. Sunrise Chevrolet, Inc.*, No. 04-CV-7668 (N.D. Ill. filed Nov. 24, 2004); *Murray v. Cingular Wireless II, LLC*, No. 05-CV-01334 (N.D. Ill. filed Mar. 7, 2005); *Ashby v. Farmers Ins. Co. of Or.*, No. 01-CV-1446 (D. Or. filed Sept. 28, 2001); *Spano v. Safeco Ins. Co. of Or.*, No. 01-CV-01464 (D. Or. filed Oct. 2, 2001); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466 (D. Or. filed Oct. 3, 2001); *Rausch v. Hartford Fin. Servs. Group, Inc.*, No. 01-CV-1529 (D. Or. filed Oct. 16, 2001); *Dowdy v. St. Paul Travelers Ins. Co.*, No. 05-CV-02718 (D.S.C. filed Sept. 19, 2005).

[34]*See, e.g., In re Farmers Ins. Co.*, No. 03-CV-158 (W.D. Okla. filed Dec. 10, 2001); *In re Trans Union Privacy Litig.*, No. 00-CV-04729 (N.D. Ill. filed Aug. 3, 2000).

when their credit information has adversely affected them—will not be served. Instead, consumers are likely to become so desensitized or confused by the adverse-action notices they unnecessarily receive that they will simply disregard them.[35] The Ninth Circuit is simply mistaken. Unfortunately, its mistake is neither simple nor trivial. As pointed out by the various amici curiae who submitted briefs in the Ninth Circuit, this mistake stands to cost insurance companies and ultimately consumers *billions* of dollars.

I. The circuits are split over how to define "willfully" under FCRA, and now the Ninth Circuit has adopted a standard that this Court expressly rejected in determining willfulness under another federal statute where much less was at stake.

A. The circuit split is real and is creating confusion and varying standards among the lower courts for awarding punitive damages.

FCRA contains two separate sections that comprise two different standards or tiers of civil liability. While actual damages can be recovered under FCRA upon a showing of "negligent" noncompliance, statutory and punitive damages can only be recovered upon a higher showing of "willful" noncompliance.[36] FCRA does not define the term "willfully," and the circuits are split over how to define it.

Specifically, with respect to the mens rea necessary to establish willful noncompliance, the circuits are split over whether reckless disregard or actual knowledge is required. Although the Third Circuit has adopted a reckless-disregard standard, at least the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits require actual knowledge with regard to the law. And now the Ninth Circuit, while purporting to adopt the Third Circuit's reckless-disregard standard, has adopted a standard that conflicts with the precedent

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[35] *See The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. 95-96 (2003) (testimony of J. Howard Beales, III, Director, Bureau of Consumer Protection, U.S. Federal Trade Commission) ("[I]f you give notices too widely and in too many circumstances, then it [*sic*] . . . becomes something that people ignore.").

[36] *Compare* 15 U.S.C. § 1681o, *with* 15 U.S.C. § 1681n.

of this Court and requires a lower form of mens rea than any other circuit, including the Third Circuit.

In *Phillips v. Grendahl*,[37] the Eighth Circuit held that to be willful under FCRA the defendant "*must . . . be conscious that his act impinges on the rights of others.*"[38] The court made clear that recklessness does not "suffice to establish willfulness under the statute."[39] And thus, "willful noncompliance under section 1681n requires knowing and intentional commission of an act *the defendant knows to violate the law.*"[40] The Eighth Circuit found support for its actual-knowledge standard in decisions of the Second, Fourth, Fifth, Sixth, and Tenth Circuits.[41]

Following the Eighth Circuit, the Seventh Circuit held in *Wantz v. Experian Information Solutions*[42] that, under FCRA, "[t]o act willfully, a defendant must knowingly and intentionally violate the Act, and *it 'must also be conscious that [its] act impinges* on the rights of others.'"[43] Since its decision in *Wantz*, the Seventh Circuit has twice reaffirmed its commitment to the Eighth Circuit's definition.[44]

Like the Seventh and Eighth Circuits, the Sixth Circuit has also adopted an actual-knowledge standard. In *Duncan v. Handmaker*,[45] the Sixth Circuit held that "defendants cannot be held civilly liable if they obtained the Duncans' reports 'under what is believed to be a proper purpose under the statute but which a court . . . later rules to be impermissible legally under § 1681b.'"[46]

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[37]312 F.3d 357 (8th Cir. 2002).

[38]*Id.* at 368 (emphasis added).

[39]*Id.* at 369.

[40]*Id.* at 370 (emphasis added).

[41]*Id.* at 368-69.

[42]386 F.3d 829 (7th Cir. 2004).

[43]*Id.* at 834 (quoting *Phillips*, 312 F.3d at 368) (emphasis added).

[44]*See Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz* and stating that to be willful a defendant must be "conscious that its act impinges on the rights of others"); and *Bagby v. Experian Info. Solutions, Inc.*, No. 04-2593, 2006 U.S. App. LEXIS 310, at **16 (7th Cir. Jan. 4, 2006) (same).

[45]149 F.3d 424 (6th Cir. 1998).

[46]*Id.* at 429; *see also Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1098 n.17 (9th Cir. 2006) ("The Sixth Circuit has implied that actual knowledge is necessary."). (App. at 32a n.17.)

Similarly, in *Stevenson v. TRW, Inc.*,[47] the Fifth Circuit stated that willfulness requires "an act in conscious disregard for the rights of others," which can only exist where the defendant engaged in "willful misrepresentations or concealments."[48] The court then held that the defendant did not act willfully because there was no evidence that the defendant had "any intention to thwart consciously" the plaintiff's rights.[49] The Fourth Circuit follows the Fifth Circuit's "conscious disregard" standard,[50] and has affirmed summary judgment for a defendant on the issue of willfulness because the plaintiff could not show that the defendant "was aware" of the alleged wrongdoing.[51]

Unlike the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, which all require actual knowledge with regard to the law, the Third Circuit defines willfulness in part using a "reckless disregard" standard. In *Cushman v. Trans Union Corp.*,[52] the Third Circuit held that "willfully" entails a "conscious disregard" of the law, which it defined as "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA *or in reckless disregard* of whether the policy [or action] contravened those rights."[53] In so doing, the Third Circuit expressly declined to follow the Fifth Circuit's holding in *Stevenson*, but made clear that its "reckless disregard" standard was not a major departure from the Fifth Circuit's standard because "a defendant's actions must be on the same order as willful concealments or misrepresentations."[54]

The Ninth Circuit has now, in this case, nominally adopted the Third Circuit's "knowing or reckless disregard" standard

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[47]987 F.2d 288 (5th Cir. 1993).

[48]*Id.* at 293-94.

[49]*Id.* at 294.

[50]*See Dalton v. Cap. Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001) (citing the Fifth Circuit's holdings in *Stevenson* and *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986)).

[51]*Dalton*, 257 F.3d at 418.

[52]115 F.3d 220 (3d Cir. 1997).

[53]*Id.* at 227 (emphasis added).

[54]*Id.*

for willfulness.[55] But the court has further defined its supposed "reckless disregard" standard by stating that a company may be found to have acted with reckless disregard if it acts diligently and in good faith but relies on an "unreasonable[]," "implausible," "creative," or "untenable" interpretation of FCRA.[56]

How willfulness is defined and construed under FCRA is an important and recurring issue. District courts in the Second, Tenth, and Eleventh Circuits have adopted varying definitions of willfulness, some requiring actual knowledge and others requiring mere "reckless disregard."[57] These decisions further demonstrate the confusion and varying standards for punitive damages that the circuit split has created. That circuit split by itself warrants certiorari because there is a clear need for definitive guidance from this Court.

B. The Ninth Circuit has adopted a willfulness standard that this Court rejected in another context because it would "permit a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect"[58] belief.

In its opinion, the Ninth Circuit ostensibly recognizes that negligence does not suffice to prove willfulness.[59] But the Ninth Circuit then defines its purported "reckless disregard"

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[55] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1098 (9th Cir. 2006) (quoting *Cushman*, 115 F.3d at 227). (App. at 31a.)

[56] *Reynolds*, 435 F.3d at 1099 (emphasis added). (App. at 33a-34a.)

[57] *Compare Jordan v. Equifax Info. Servs.*, 410 F. Supp. 2d 1349, 1354 (N.D. Ga. 2006) (adopting the Eighth Circuit's standard), *Cole v. Am. Family Mut. Ins. Co.*, 410 F. Supp. 2d 1020, 1024 (D. Kan. 2006) (adopting an actual knowledge standard), and *Spector v. Equifax Info. Servs.*, 338 F. Supp. 2d 378, 387-88 (D. Conn. 2004) (applying actual knowledge standard); *with Apodaca v. Discover Fin. Servs.*, 417 F. Supp. 2d 1220, 1228-29 (D.N.M. 2006) (adopting the reckless disregard standard), and *Veno v. AT&T Corp.*, 297 F. Supp. 2d 379, 384 (D. Ma. 2003) (stating that reckless indifference is sufficient to prove willfulness).

[58] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 (1988).

[59] *See Reynolds*, 435 F.3d at 1097-98 (stating as much and then citing, at page 1098 in its discussion of the mens rea required with regard to the law, footnote 13 from this Court's opinion in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988)). (App. at 30a, 32a.)

standard by stating that a company may be found to have acted recklessly unless it (1) has "diligently and in good faith" attempted to determine its obligations *and* (2) "*has thereby* come" to a "reasonable," "plausible" (which means reasonable), non-"creative," and "tenable" interpretation of FCRA:

> [This reckless-disregard standard] encourages companies that use consumer credit reports *to make the necessary effort* to inform themselves fully and fairly as to their statutory obligations . . . .
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> . . . A company will not have acted in reckless disregard of a consumer's rights if it has *diligently and in good faith* attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute *and has thereby come to a tenable, albeit erroneous, interpretation of the statute.* In contrast, neither a deliberate failure to determine the extent of its obligations *nor reliance on creative lawyering that provides indefensible answers* will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. *Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.*
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> Where, *as here*, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. . . . *Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation.* In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel.[60]

This willfulness standard is virtually identical to the standard that this Court rejected in another context, where much less

[60] *Reynolds*, 435 F.3d at 1099 (emphasis added). (App. at 33a-34a.)

was at stake, because such a standard "make[s] the issue in most cases turn on whether the [defendant] sought legal advice," and "permit[s] a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect assumption."[61]

In *McLaughlin v. Richland Shoe Co.*,[62] this Court granted certiorari to determine "the meaning of the word 'willful' as used in the statute of limitations applicable to civil actions to enforce the Fair Labor Standards Act" ("FLSA").[63] Unlike here, where the consequence of a willfulness finding is punitive damages, under the FLSA, if a violation is willful, the statute of limitations is extended from two to three years.[64] In *Richland Shoe*, the Secretary of Labor urged this Court to adopt a standard that is virtually identical to the one adopted by the Ninth Circuit in this case:

> We think an employer's unlawful pay practices should be found willful for purposes of the FLSA limitations provision when the employer is aware of the potential application of the FLSA but pursues the pay practices *without reliable assurances of their legality*. . . . If . . . the employer fails to take steps reasonably calculated to determine whether its practices comply with the law, its violations should be considered willful. If the employer does take steps to determine its legal responsibilities, then *it may limit its liability by showing that it received reasonable advice* that its practices complied with the law and that it relied in good faith on such advice.
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> . . . .
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> [A]n employer's violation should be held willful if the employer, recognizing it may be covered by the FLSA, *acted without a reasonable basis for believing that it was complying with the statute. Such a basis may be absent because the employer failed*

[61] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988).
[62] 486 U.S. 128.
[63] *Id.* at 129.
[64] *Id.*

> *to seek a reliable determination of its obligations under the FLSA or because the advice it received afforded no sound basis for eliminating existing uncertainties about the employer's compliance.*[65]

This Court observed that the Secretary's standard "would apparently make the issue in most cases turn on whether the employer sought legal advice concerning its pay practices."[66] The Court then rejected that standard because "*[i]t would . . . permit a finding of willfulness to be based on nothing more than negligence, or perhaps, on a completely good-faith but incorrect assumption that a pay plan complied with the FLSA in all respects.*"[67] The Court adopted a "reckless disregard" standard for willfulness, but then took the opportunity to clarify some of the language that it had used in an earlier opinion to point out that "unreasonableness" does not suffice to prove reckless disregard:

> We recognize that there is some language in *Trans World Airlines v. Thurston*, 469 U.S. 111, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) . . . , not necessary to our holding, *that would seem to permit a finding of unreasonableness to suffice as proof of knowing or reckless disregard*, and thus that would render [the Secretary's] standard an appropriate statement of the law. *See id.*, at 126. Our decision today should clarify this point: If an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful under either [the Secretary's] test or under the standard we set forth. *If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then, although its action would be considered willful under [the Secretary's] test, it should*

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[65]Brief for the Petitioner, *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 905, at *25, 62 (emphasis added); *see also* Petition for a Writ of Certiorari, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 907, at *29 (urging the same standard).

[66]*Richland Shoe*, 486 U.S. at 134.

[67]*Id.* at 135 (emphasis added).

not be so considered under Thurston or the identical standard we approve today.[68]

The Secretary of Labor's proposed-but-rejected willfulness definition in *Richland Shoe* and the Ninth Circuit's willfulness definition in this case are similar if not identical. Indeed, under the Secretary's proposed standard in *Richland Shoe*, the inquiry focused on whether the employer sought legal advice, and, if so, whether the legal advice received was "reasonable," whether the advice provided "reliable assurances," and whether the advice provided a "reasonable" or "sound basis" for the employer to believe that it was complying with the FLSA.[69] Likewise, under the Ninth Circuit's willfulness standard, the inquiry focuses on whether a company sought legal advice, and, if so, whether the advice that it received was "reasonable," "plausible," non-"creative," and "tenable."[70]

If the Secretary's proposed willfulness definition in *Richland Shoe* was inappropriate because "[i]t would . . . permit a finding of willfulness to be based on nothing more than negligence, or . . . a completely good-faith but incorrect" belief,[71] the Ninth Circuit's standard is all the more inappropriate here because it too would permit a finding of willfulness to be based on nothing more than some form of negligence or a completely good-faith but incorrect belief, and here the stakes are much higher. In the context of the FLSA, the consequence of a willful violation is a one-year extension of the statute of limitations, whereas here, a class of plaintiffs—*with no actual harm or damages*—could be entitled to recover literally millions of dollars in statutory and punitive damages. Moreover, the need to clearly delineate negligence and

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[68] *Id.* at 135 n.13 (emphasis added); *accord Hazen Paper Co. v. Biggins*, 507 U.S. 604, 616 (1993) ("If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.").

[69] *See* Brief for the Petitioner, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 905, at *25, 62 (emphasis added); *see also* Petition for a Writ of Certiorari, *Richland Shoe*, 486 U.S. 128 (No. 86-1520), 1987 U.S. S. Ct. Briefs LEXIS 907, at *29.

[70] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1099 (9th Cir. 2006). (App. at 33a-34a.)

[71] *Richland Shoe Co.*, 486 U.S. at 135.

willfulness in the context of FCRA is even greater than in the context of the FLSA because Congress intentionally provided two separate tiers of civil liability under FCRA: one for negligence and another for willfulness.[72]

Worse still, the Ninth Circuit's standard has effectively shifted the burden of proof by presuming willfulness in the absence of a showing of non-willfulness. Until now, the plaintiff has borne the burden of proof.[73] But under the Ninth Circuit's standard, if a company violates FCRA, the company can only avoid a willfulness finding if it *waives the attorney-client privilege and proves* that its lawyer's interpretation of the Act was "plausible," "reasonable," non-"creative," and "tenable." At least one district court has already recognized this shift in the burden of proof: "The new opinion in *Reynolds* . . . leaves open the possibility, *albeit by a small margin, that an insurer might be able to establish it did not act willfully* in formulating an unlawful adverse action notice, if the formulation of the notice was based on advice of counsel."[74] The Ninth Circuit's standard places a burden on companies that was never intended under FCRA.

Finally, practically speaking, perhaps as significant as any problem created by the Ninth Circuit's standard is that it is completely unworkable. Companies now have no idea how to avoid being punished with punitive damages. The Ninth Circuit's standard states that a company can avoid a willfulness finding if it acts "diligently and in good faith . . . *and has thereby come* to a tenable, albeit erroneous, interpretation" of FCRA.[75] Under that standard, a company can only avoid a willfulness finding if its interpretation of FCRA is later determined by a court to be "tenable." But this is not a practical standard. What is an "unreasonable[]," "implausible," "creative," and/or "untenable" legal opinion? And who determines if an incorrect interpretation of FCRA was "unreasonable[]," "implausible," "creative," and/

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[72]*Compare* 15 U.S.C. § 1681o, *with* 15 U.S.C. § 1681n.

[73]*See Wantz v. Experian Info. Solutions*, 386 F.3d 829, 833 (7th Cir. 2004) ("It is the plaintiff's burden to establish that he is entitled to damages.").

[74]*Ashby v. Farmers Ins. Co. of Oregon*, No. CV 01-1446-BR, slip op. at 8 (D. Or. Feb. 28, 2006) (emphasis added).

[75]*Reynolds*, 435 F.3d at 1099 (emphasis added). (App. at 34a.)

or "untenable"? Is a district court to decide as a matter of law? Or, as in this case, could a district court agree with a company's interpretation, grant summary judgment in the company's favor, only later for the Ninth Circuit to decide that the company's lawyer—*and therefore the district court*—had an incorrect and unreasonable interpretation of FCRA and thereby expose the company to statutory and punitive damages? How is a company to determine if its lawyer's interpretation is incorrect, implausible, unreasonable, or untenable, if the very reason the company sought legal advice in the first place was to learn how to comply with the law? Will a company be required to hire another lawyer to evaluate the quality of its lawyer's legal advice? The reality is, of course, that most companies do not independently research the legal issues on which they seek expert legal advice. As this Court has noted in another context, to require a company to challenge its lawyer or to seek a second or third opinion "would nullify the very purpose of seeking the advice of a presumed expert in the first place."[76] Perhaps no one would dispute that deliberately seeking an erroneous opinion to support an unlawful action could constitute willfulness. But if a company attempts to comply with FCRA by diligently and in good faith seeking and relying on a legal opinion, that company should not be punished with punitive damages for a willful violation because the Ninth Circuit later determines that its lawyer's interpretation of FCRA was unreasonable, implausible, or creative. The Ninth Circuit's standard, in effect, converts a lawyer's mere mistake or negligence into a client's recklessness.

To fully appreciate this point, the Court need only look to its own precedent in *Trans World Airlines, Inc. v. Thurston*.[77] In *Thurston*, the Court held that a "knew or showed reckless disregard" standard was an acceptable way to define willfulness under the Age Discrimination in Employment Act ("ADEA").[78] Despite holding that one of the defendant's defenses was not only incorrect but was also "meritless,"[79] this

[76] *United States v. Boyle*, 469 U.S. 241, 251 (1985).

[77] 469 U.S. 111 (1985).

[78] *Id.* at 125-26.

[79] *Id.* at 124.

Court held that the defendant did not act in reckless disregard of its obligations because it acted in good faith and tried to determine its obligations.[80] Importantly, the Court did not hold that the defendant acted in reckless disregard of the law because it and/or its lawyer relied on a "meritless" interpretation of the ADEA. Instead, the Court's inquiry centered on the *defendant's* actions and mens rea (or lack thereof) – not the quality of the advice the defendant received from counsel.

Companies must be given clear standards so that they can comply with the law and know how to avoid being punished with punitive damages. As Judge Richard Posner noted in another context, without such guidelines punitive damages fail to serve any valid purpose:

> [P]unitive damages, like criminal fines which they resemble, are reserved for cases where the wrongfulness of the defendant's conduct is conspicuous, implying that its wrongfulness is apparent to the person who engages in it, and not just to a lawyer. If one needed great subtlety to realize that one had strayed into the forbidden zone where punitive damages are a sanction, the deterrent effect of such damages would be distorted. Some people would stray into the zone unknowingly; as to them the threat of punitive damages would not deter. Others would steer far clear of the zone, not knowing where it began; as to them lawful as well as unlawful conduct would be deterred.[81]

But under the Ninth Circuit's standard, even "great subtlety" cannot remove the threat of punitive damages. Indeed, a company could retain the best lawyer with the most specialized knowledge of FCRA, provide full disclosure to the lawyer, rely in good faith on the lawyer's interpretation of FCRA with no authority to the contrary, convince a federal judge (the epitome of a reasonable jurist) that the company's interpretation of FCRA was correct, and then still be held to

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[80] *Id.* at 129-30.

[81] *Soderbeck v. Burnett County*, 752 F.2d 285, 291 (7th Cir. 1985).

have acted willfully if the Ninth Circuit determines that the lawyer's interpretation falls below some undefined level of incorrectness. Companies acting diligently and in good faith can and will be punished under the Ninth Circuit's standard, all efforts to the contrary notwithstanding.

On two different occasions the Ninth Circuit withdrew and tried to correct its opinion in this case. Given the changes that the Ninth Circuit made to its first opinion in particular, it is obvious that the Ninth Circuit recognized that it had adopted a negligence standard for willfulness. Although the Ninth Circuit tried to remove the negligence standard from its opinion, its "unreasonableness" analysis still remains as a test for reckless disregard and thereby willfulness. But as this Court stated in *Richland Shoe*, "unreasonableness . . . [does not] suffice as proof of knowing or reckless disregard."[82]

C. The Fourth, Fifth, Sixth, Seventh, and Eighth Circuits are correct—willfulness under FCRA should require actual knowledge with regard to the law.

The Ninth Circuit adopted its reckless-disregard standard in part because the Ninth Circuit believed that it was consistent with this Court's holding in *Trans World Airlines v. Thurston*,[83] which interpreted the term "willfully" as used in the ADEA.[84] But the Ninth Circuit ignored the fact that a reckless-disregard standard was adopted in *Thurston* largely because the ADEA's legislative history suggested that Congress intended for liquidated damages to apply to reckless conduct.[85] The Ninth Circuit cited no legislative history, presumably because there is none, to support its holding that "willfully" in FCRA means "reckless disregard." Actually, quite to the contrary, FCRA's legislative history supports the interpretation of the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits that "willfully" means actual knowledge with respect to the law.

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[82] *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988).

[83] 469 U.S. 111.

[84] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1098 (9th Cir. 2006). (App. at 31a-32a.)

[85] *Thurston*, 469 U.S. at 125-26; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (recognizing that *Thurston*'s reckless disregard standard was grounded in the legislative history of the ADEA).

The bill that ultimately became FCRA originally contained a gross-negligence standard for actual damages and a willfulness standard for actual and punitive damages.[86] After considering whether to lower the standard for the recovery of actual damages to simple negligence, and to allow actual damages and punitive damages for either willful *or grossly negligent* violations,[87] Congress ultimately adopted negligence as the standard for actual damages and willfulness as the standard for actual and punitive damages.[88] Congress thus chose to limit the availability of punitive damages to violations that were willful, rather than grossly negligent.[89]

At the time that Congress enacted FCRA, recklessness and gross negligence were the same for all practical purposes.[90] Thus, the Ninth Circuit's adoption of a "reckless disregard" standard effectively reads back into § 1681n the gross-negligence standard that Congress deliberately chose not to include over thirty-five years ago. If Congress had intended to include a "gross negligence" standard in § 1681n, it certainly knew how to do so.[91] It did not. Thus, the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits correctly require a knowing violation of the law for willfulness.

Finally, even assuming *arguendo* that a reckless-disregard standard is appropriate in the context of FCRA, which it is not, any such recklessness standard should at a minimum require recklessness in its subjective form. A subjective form of recklessness would be more consistent with this Court's

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[86]S. 823, 91st Cong. §§ 616-17 (1969).

[87]H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970).

[88]H.R. Rep. No. 91-1587, at 30 (1970) (Conf. Rep.).

[89]15 U.S.C. § 1681n (1970).

[90]*See, e.g.*, Black's Law Dictionary 1185 (4th ed. 1968) (defining "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences"); *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 491 (1875) (defining gross negligence in part as "utter recklessness"); and *United States v. Schmidt*, 626 F.2d 616, 617 (8th Cir. 1980) (defining "gross negligence" under 18 U.S.C. § 1112 as conduct done "with a wanton or reckless disregard for human life").

[91]*See also* 10 U.S.C. § 909 (2000) ("Any person . . . who willfully or recklessly" wastes, spoils, or destroys military property is subject to punishment.)

repeated efforts to prevent the imposition of punitive damages where a company incorrectly interprets the law in good faith.

Not long ago, in *Kolstad v. American Dental Ass'n*,[92] this Court granted certiorari to decide the circumstances under which punitive damages can be awarded in an action brought under Title VII of the Civil Rights Act of 1964.[93] The Civil Rights Act of 1991 limits compensatory and punitive damages to cases of "intentional discrimination" but further qualifies the availability of punitive awards by making them available only where the defendant acted "with malice *or with reckless indifference* to the federally protected rights of an aggrieved individual."[94] Part of this Court's analysis in *Kolstad* focused on the proper way to define "reckless indifference."[95]

In *Kolstad*, the Court noted that the "reckless indifference" standard in Title VII is the same "reckless disregard" standard that the Court has adopted for awarding liquidated damages under the ADEA.[96] The Court made it clear, however, that punitive damages could only be awarded under this standard where there has been "recklessness in its subjective form,"[97] i.e., the "employer must at least discriminate in the face of a *perceived risk* that its actions will violate federal law."[98] This is partly because punitive damages are designed in part to punish "criminal indifference to civil obligations."[99] Consequently, as in *Richland Shoe*, the Court emphasized that an incorrect interpretation of the law, held in good faith, should not and could not give rise to punitive damages under this subjective standard:

> *There will be circumstances where intentional discrimination does not give rise to punitive damages*

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[92]527 U.S. 526 (1999).

[93]*Id.* at 529.

[94]42 U.S.C. § 1981a(b)(1) (2000) (emphasis added).

[95]*See Kolstad*, 527 U.S. at 533-39.

[96]*See id.* at 537 (relying on the *Hazen Paper* "knew or showed reckless disregard" standard); *see also id.* at 548 (Stevens, J., concurring) (stating that the 1991 Act's standard was the same standard as used in the ADEA; discussing *Thurston* and noting that its reckless disregard standard requires "subjective consciousness").

[97]*Id.* at 535-36.

[98]*Id.* at 536 (emphasis added).

[99]*Smith v. Wade*, 461 U.S. 30, 41 (1983).

> *liability under this standard. In some instances, the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful.*[100]

The Ninth Circuit's reckless-disregard standard in this case sets a lower threshold for punitive damages than this Court set in *Kolstad* because it allows a court to decide as a matter of law that a company has acted recklessly if the company should have known (based, for example, on its lawyer's *purportedly* "implausible" interpretation of the law), rather than actually did know, that there was a substantial risk that its policies or actions were in violation of FCRA.[101] Assuming *arguendo* that a "reckless disregard" standard is the proper way to determine willfulness in the context of FCRA, this reckless-disregard standard must be defined, as it was in *Kolstad*, to require recklessness in its subjective form. Otherwise any company that acts diligently and relies in good faith on what is later determined to be an incorrect interpretation of the law will nonetheless risk liability for statutory and punitive damages.

D. Because the district court interpreted FCRA precisely as did GEICO, GEICO's actions were objectively reasonable as a matter of law, precluding any finding of willfulness.

It is well settled in various contexts that a claim or defense asserted in litigation is not objectively baseless if it is one that a reasonable attorney would make. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,[102] while discussing the "sham" exception to the doctrine of antitrust immunity, this Court stated that "[a] winning lawsuit is by

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[100] *Kolstad*, 527 U.S. at 536-37 (emphasis added); *see also Wade*, 461 U.S. at 41-51 (noting that malice is not required to justify a punitive award but requiring recklessness in its subjective form).

[101] *See City of Canton v. Harris*, 489 U.S. 378, 390 (1989) (adopting an objective recklessness standard for purposes of establishing threshold liability under 42 U.S.C. § 1983); and *Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (comparing objective recklessness with subjective recklessness).

[102] 508 U.S. 49 (1993).

definition a reasonable effort."[103] Thus, where a legal argument is successful in the trial court, then by definition that argument is objectively reasonable and cannot be deemed to be unreasonable.

Here, the district court agreed with GEICO's interpretations of FCRA, determined that GEICO had complied with FCRA, and granted summary judgment in GEICO's favor. This conclusively establishes that GEICO's interpretations and conduct were objectively reasonable as a matter of law.[104] The Ninth Circuit should not have remanded to the district court for an inquiry into the quality of the advice that GEICO received from its counsel and/or GEICO's subjective intent.

Given the circuit split, the Ninth Circuit's adoption of a willfulness standard that this Court rejected in *Richland Shoe* and a recklessness standard that this Court rejected in *Kolstad*, and the Ninth Circuit's decision to remand for an inquiry into the quality of GEICO's and its lawyers' interpretations of FCRA, it is imperative that this Court grant certiorari and establish a uniform rule, removing the confusion and disarray presently existing among the circuits. This case provides an excellent vehicle for resolving this important issue.

II. The Ninth Circuit's opinion imposes a new regulatory burden on insurance companies, the likely effect of which will be to confuse countless consumers who will receive adverse-action notices even though their credit information had either no impact or a favorable impact on their insurance.

Certiorari is also necessary to correct the Ninth Circuit's misinterpretation and misapplication of an absolutely critical substantive requirement of FCRA. The Ninth Circuit held that an adverse action has occurred and notice is required under § 1681m of the Act, even when a consumer's credit information has had no adverse impact on the rates or terms provided. Since FCRA took effect in 1970, no federal appellate court had

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[103] *See id.* at 60 n.5.

[104] *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 135 n.13 (1988) (stating that if an employer acts reasonably it cannot be deemed to have acted willfully).

ever interpreted FCRA's definition of an adverse action in the context of insurance, until now. The Ninth Circuit's decision is the first published decision on the issue by *any* federal appellate court, and it has far-reaching state and national implications—both to American insurance consumers and to the entire insurance community. Unfortunately, the Ninth Circuit's decision has significantly burdened the insurance industry by imposing a new requirement on insurance companies not intended by Congress: that a company send an adverse-action notice even where the consumer has not suffered any adverse action. The likely effect of the Ninth Circuit's new requirement will be to "confuse tens of thousands of consumers whose insurance premiums are lower due to their favorable credit histories."[105]

Section 1681m of FCRA provides in part: "If any person takes any *adverse action* with respect to any consumer *that is based in whole or in part on any information contained in a consumer report*, the person shall . . . provide oral, written, or electronic notice of the adverse action to the consumer . . . ."[106] In connection with insurance, FCRA defines an "adverse action" as follows:

> The term "adverse action" . . . means . . . a denial or cancellation of, an increase in any charge for, or a reduction or other *adverse or unfavorable change* in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance . . . .[107]

But the Ninth Circuit has become the first federal appellate court to hold that an "adverse action" occurs and notice is required *even if a consumer's credit information helped him obtain a better rate for insurance* than if that information had not been considered. Rather than asking whether consideration of a consumer's credit information resulted in less favorable terms or rates, the inquiry under the Ninth Circuit's standard is now whether the consumer (who is already receiving the same or

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[105]Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, Washington Legal Foundation Legal Backgrounder, Jan. 27, 2006, *available at http://www.wlf.org/upload/012706LBDetlefsen. pdf.*

[106]15 U.S.C. § 1681m(a)(1) (emphasis added).

[107]15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

more favorable terms or rates than if his insurance score had not been used in any way) would have received an even better rate if his insurance score had been even better:

> [FCRA] requires such [adverse action] notices whenever a consumer pays a higher rate because his credit rating *is less than the top potential score*. In other words, if the consumer would have received a lower rate for his insurance *had the information in his consumer report been more favorable*, an adverse action has been taken against him.[108]

There is no provision in FCRA to support this construction of "adverse action." The Ninth Circuit's faulty, conclusory analysis rests upon the unsupported assumption that Congress intended for an adverse action to be determined in the insurance context, not by looking at the actual impact of a consumer's credit information on that consumer's insurance terms or rate, but instead by comparing the rate or terms obtained by the consumer with the rate or terms available to the consumer with a more favorable credit report. As one commentator has since noted:

> According to [the Ninth Circuit's] reasoning, a hypothetical first-time applicant for an auto insurance policy who was offered a premium discount because of her above-average credit score would nonetheless have suffered an "adverse action" at the hands of the insurer if an even better credit score would have qualified her for the insurer's very best rate. Even granting that the meaning of FCRA's adverse-action notice requirement is less than crystal clear, the panel's interpretation – that an insurer should be required to notify the consumer that she had been *adversely* affected when in fact she was helped by the use of her insurance score – defies common sense. Indeed, one wonders how an insurer would go about drafting such a notice. The panel's reasoning evokes that of a student who regards an "A" grade

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[108] *Reynolds v. Hartford Fin. Servs. Group, Inc.*, 435 F.3d 1081, 1093 (9th Cir. 2006) (emphasis added). (App. at 20a-21a.)

as an adverse action because his professor could conceivably have given him an "A-plus."[109]

Nowhere does the language of FCRA indicate that Congress intended for a company to be deemed to have taken an "adverse action" against an insurance consumer and required to issue an adverse-action notice merely because that consumer did not receive the company's lowest possible premium or "best rate." Under FCRA, *the consumer's credit information must have been the cause,* in whole or in part, of a less favorable rate or adverse terms. *If a consumer receives the same rate and terms that he otherwise would have received if his credit information had not been considered, no adverse-action notice should be required because the consumer's credit information has had no impact on his rate or terms.*

The uncontroverted evidence in this case shows precisely the problem with the Ninth Circuit's construction of "adverse action." GEICO's consideration of Edo's credit information had no impact whatsoever on the rate or terms of his insurance. Edo received the same rate and terms within the GEICO family of companies that he would have received *if his consumer credit information had not been considered.*[110] This is undisputed. The Ninth Circuit acknowledged this.[111] Edo has never contended that "but for" the use of his insurance score, he would have been offered insurance with better rates or terms. Yet, under the Ninth Circuit's reasoning, Edo was subject to at least one "adverse action" by GEICO, not because an examination of Edo's actual credit history led GEICO to decrease his coverage or charge him a higher premium, *but because Edo's consumer credit information did not have a more positive impact on the rate or terms he received.* There is simply no support in the plain language or legislative history of FCRA for holding that GEICO took any adverse or negative action against Edo on the basis of any actual credit information about Edo that GEICO considered.

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[109]Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable,* Washington Legal Foundation Legal Backgrounder, Jan. 27, 2006, *available at http://www.wlf.org/upload/012706LBDetlefsen.pdf* (footnote omitted).

[110](ER at 55, ¶ 11.)

[111]*Reynolds,* 435 F.3d at 1093 n.12. (App. at 21a n.12.)

The Ninth Circuit's new definition of "adverse action" requires an insurance company to inform a consumer (whose credit information has not adversely impacted her) that, had the consumer had a *better* credit report, she might have been *impacted positively*. While Congress enacted FCRA in part so that consumers will know when their credit information has adversely affected them, the insurance industry is now at a loss regarding how to draft an adverse-action notice under the Ninth Circuit's new adverse-action definition. The following has been suggested:

> Dear Insurance Applicant: Due to your favorable credit history, we are able to offer you a premium that is considerably lower than the premium we would have charged had you not had such a favorable credit history. That said, your credit is not quite good enough to qualify for our very lowest rate. Therefore, our offer of a substantial premium discount based on your excellent credit history constitutes an adverse action against you by us.[112]

This, of course, makes no sense. Because of the Ninth Circuit's definition, when consumers receive adverse-action notices, they will think that the use of their actual credit information hurt them, when, in fact, use of their actual credit information may not have had any impact on the terms or cost of their insurance—as in the case of Edo. In fact, use of that information may have even helped them. Given the substantial burden on the insurance industry and the confusion that the Ninth Circuit's opinion has created, there is a compelling need for this Court to exercise its supervisory power.

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[112]Robert Detlefsen, *Court's Ruling Applying Credit Act to Insurers Legally Unsupportable*, Washington Legal Foundation Legal Backgrounder, Jan. 27, 2006, *available at http://www.wlf.org/upload/012706LBDetlefsen. pdf.*

CONCLUSION

The Ninth Circuit's standard for willfulness, which admittedly conflicts with the standard adopted by other Circuits, sets an impermissibly low threshold for the award of punitive damages by punishing companies that act in good faith. Moreover, the Ninth Circuit's erroneous definition of what constitutes an "adverse action" under FCRA potentially affects every insurance company, every user of consumer credit information, and even every insurance consumer in America. For all of the reasons identified herein, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JANUARY 25, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 03-35695, 04-35279

JASON RAY REYNOLDS; MATTHEW RAUSCH,

Plaintiffs-Appellants,

v.

HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

AJENE EDO,

Plaintiff-Appellant,

v.

GEICO CASUALTY COMPANY,

Defendant,

and

GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Subsidiaries of Geico corporation,

Defendants-Appellees.

Argued and Submitted March 8, 2005.
Filed January 25, 2006.

Appendix A

JUDGES: Before: Stephen Reinhardt, Marsha S. Berzon, and Jay S. Bybee, Circuit Judges. Opinion by Judge Reinhardt.

OPINION

REINHARDT, Circuit Judge:

Under the Fair Credit Reporting Act ("FCRA"), insurance companies are required to send adverse action notices to consumers whenever they increase the rates for insurance on the basis of information contained in consumer credit reports. 15 U.S.C. §§ 1681a(k)(1)(B)(i), 1681m(a).[1] The principal question before us is straightforward: Does FCRA's adverse action notice requirement apply to the rate first charged in an initial policy of insurance? We hold that the answer is yes: The Act requires that an insurance company send the consumer an adverse action notice whenever a higher rate is charged because of credit information it obtains, regardless of whether the rate is contained in an initial policy or an extension or renewal of a policy and regardless of whether the company has previously charged the consumer a lower rate.

We also resolve five ancillary questions. First, we hold that FCRA's adverse action notice requirement applies whenever a consumer would have received a lower rate for

1. Section 1681m(a) provides that any person who "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report" must provide "notice of the adverse action to the consumer." Section 1681a(k)(1)(B)(i) defines an "adverse action" as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

insurance had his credit information been more favorable, regardless of whether his credit rating is above or below average. Specifically, the requirement covers those whose credit information is disregarded and replaced for purposes of a rate computation by an average or neutral credit figure, so long as the insurance rates would have been lower had the credit information been more favorable. Second, we hold that charging more for insurance on the basis of a transmission stating that no credit information or insufficient credit information is available constitutes an adverse action based on information in a consumer report and therefore requires the giving of notice under FCRA. Third, we hold that, to comply with FCRA's notice requirement, a company must, *inter alia*, communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. Fourth, we hold that when a consumer applies for insurance with a family of companies and is charged a higher rate for insurance because of his credit report, two or more companies within that family may be jointly and severally liable. The notice requirement applies to any company that makes a decision that a higher rate shall be imposed, issues a policy at a higher rate, or refuses to provide a policy at a lower rate, if the company's action is based in whole or in part on the consumer's credit information.[2] Finally, we adopt the Third Circuit's definition of "willfully," as that term is employed in FCRA, and hold that a company is liable for a willful violation of FCRA if it "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226

2. We do not intend this list to be exhaustive.

(3d Cir. 1997) (quoting *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996) (as amended)). Like the Third Circuit, we hold that conscious disregard means "either knowing that policy to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy contravened those rights." *Id.* at 227.

I. THE ACT AND THE APPEALS

The Fair Credit Reporting Act seeks to ensure the "[a]ccuracy and fairness of credit reporting" through a variety of means. 15 U.S.C. § 1681. Central to this goal, FCRA limits the persons who may obtain consumer credit reports and requires users of such reports to notify consumers when, in reliance on a consumer report, "adverse action" has been taken. 15 U.S.C. §§ 1681a, 1681b, 1681m. Specifically, § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer." Adverse action notices advise consumers that an adverse action has been taken against them, and the nature of that action, and alerts them that they may view a copy of the consumer report that triggered the adverse action free of charge and correct any errors affecting their economic well-being. Even if reports are free from error, adverse action notices give consumers important information about how improved credit information may benefit them and how they can avoid receiving unfavorable credit ratings in the future.

Appendix A

To resolve the various issues that have arisen regarding FCRA's notice of adverse action requirement in a set of related cases, we have consolidated two appeals for purposes of this opinion: *Reynolds v. Hartford Financial Services Group, Inc.*, No. 03-35695 and *Edo v. GEICO Casualty Co.*, No. 04-35279. *Reynolds* presents the principal issue: May a rate first charged in an initial policy of insurance constitute an increased rate for purposes of the FCRA adverse action notice requirement? Hartford Fire asserts that a rate cannot qualify as increased unless a lower rate has previously been charged to the customer. *Reynolds* also presents the issues whether a communication stating that no credit information or insufficient credit information is available constitutes a "consumer report" under the statute and whether an adverse action notice that does not tell the consumer that an adverse action has been taken against him, describe that action and its effect upon the consumer, and identify the parties taking the action is sufficient under FCRA. *Edo* presents the issue whether an adverse action occurs whenever a consumer would have received a lower rate if his credit information had been more favorable; or whether an insurance company's practice of providing an adverse action notice only if the consumer's credit information is below average (or "neutral") and that factor results in the imposition of a higher rate than if his credit rating had been average, is consistent with FCRA. Both *Edo* and *Reynolds* also require us to decide which companies are liable under FCRA for the failure to give notice of an increased rate when several affiliated companies are involved in the process of rate-setting and policy issuance. Finally, defendants in both cases seek summary judgment on the alternative ground that their actions were not willful as a matter of law. To address this

last contention, we must define the meaning of the term "willfully" as it applies in FCRA.

A. Reynolds v. Hartford Financial Services Group, Inc.

Jason Reynolds is the sole remaining named-plaintiff in this class action against Hartford Fire Insurance Company ("Hartford Fire").[3] He seeks statutory and punitive damages, as well as reasonable attorneys fees for the company's violation of FCRA's adverse action notice requirement. Reynolds' claims relate to two insurance policies he obtained, one for automobile and the other for homeowners insurance. On the record before us, Hartford Fire set the rates to be charged for both policies. Hartford Property and Casualty Insurance Company of Hartford ("PCIC Hartford") issued Reynolds the homeowners insurance policy and Hartford Insurance Company of the Midwest ("Hartford Midwest") issued him the automobile insurance policy. We refer to Hartford Fire, Hartford PCIC, and Hartford Midwest as the "Hartford Companies."

Reynolds originally sued Hartford Fire and later sought to amend his complaint to add PCIC Hartford and Hartford Midwest.[4] Hartford Fire sought summary judgment, which the district court granted on two grounds. First, it held that "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the

3. Rausch is no longer pursuing his appeal.

4. Reynolds also named Hartford Financial Services Group, Inc., which serves as a holding company, but is not pursuing his claims against that entity.

contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." Second, and in the alternative, it held that an insurance company that issues a policy to a new policy-holder "cannot [be held to] 'increase' a charge for insurance unless the insurer makes an initial demand for payment of the insured and subsequently increases the amount of that demand based on information in the insured's credit report." The second and alternative holding relies on a previous decision by the same court, *Mark v. Valley Insurance Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003). On the basis of that earlier decision, the district court also denied Reynolds leave to amend, reasoning that he could not "state viable FCRA claims against the proposed defendants," PCIC Hartford and Hartford Midwest. In other words, leave was denied on the ground that the policies were initial issues and no previous charge had been made to the customer at a lower rate.

The Hartford Companies' Use of Credit Information

During the relevant time period, Hartford Fire and the American Association of Retired Persons ("AARP") had an agreement under which Hartford Fire or one of its subsidiaries would issue automobile and homeowners insurance to AARP members at a premium rate if those individuals enjoyed favorable credit ratings. While the procedures used for issuing the two kinds of insurance varied slightly, they were the same in most relevant respects. In both cases, employees of Hartford Fire would make all of the decisions concerning AARP members' insurance policies for all of its subsidiaries, including Hartford Midwest, which issued automobile insurance, and PCIC Hartford, which issued homeowners

insurance. In doing so, Hartford Fire's employees would obtain credit information from Trans Union, a consumer information bureau, through a contract to which Hartford Fire and Trans Union were signatories. This information would be conveyed to Hartford Fire through the risk assessment and data supply firm, ChoicePoint, in the form of an "insurance score." High insurance scores correlated with more favorable credit reports. With regard to automobile insurance, if an AARP member had a high enough insurance score, he would qualify for a ten percent discount. With regard to homeowners insurance, only if the member obtained a top insurance score could he be assigned to the top tier of insurance with the best rate.

If, when Hartford Fire sent a request for an insurance score, no credit information matched the name and address of the consumer or if the information that did match was insufficient to generate an insurance score, this information would be transmitted to the company, and the consumer would be labeled a "no hit" or a "no score" and would not be assigned an insurance score. Without an insurance score, the consumer could not qualify for the ten percent discount with Hartford Midwest, nor could he be placed in the top insurance tier with PCIC Hartford. As a result, a "no hit" or "no score" consumer would in numerous instances pay more for insurance than if he had received a high insurance score.[5]

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5. In connection with Reynolds' request for automobile insurance, he was labeled a "no hit" because his name and address did not match any person's in the national database. In connection with his homeowners insurance request, he was labeled a "no score" because, while his name and address did call up information in the database, the information was insufficient to generate an insurance score. As both a label of "no hit" and "no score" have the same practical effect, for convenience's sake we will hereafter refer in this opinion to a report in either category as a "no hit."

Appendix A

The Hartford Companies' Adverse Action Policy

Hartford Fire is the only one of the Hartford Companies to have developed or sent adverse action notices. The parties dispute whether Hartford Fire actually sent an adverse action notice to Reynolds, but that is a question of fact for the factfinder. Whether the notice Hartford Fire contends it sent was adequate under FCRA is a question of law that we discuss below.

Reynolds' Insurance Policies

Reynolds applied for both automobile and homeowners insurance by contacting the Hartford Companies. He had no existing policy with that group. An employee of Hartford Fire collected personal information and attempted to obtain Reynold's insurance score twice, once for each insurance application. The credit bureau reported both times that Reynolds was a "no hit." *See* n. 5, *supra.* Although Hartford Midwest issued him an automobile insurance policy and Hartford PCIC issued him a homeowners insurance policy, as a result of his "no hit" status Reynolds did not receive either of the AARP premium rates.

B. Edo v. GEICO Casualty Co.

The second of the consolidated cases relates to an automobile insurance policy obtained by Ajene Edo. Like Reynolds, Edo seeks statutory and punitive damages, as well as reasonable attorney fees, on behalf of a class of consumers for violation of FCRA's adverse action notice requirement. He, too, is the sole remaining named-plaintiff. Edo appeals

the district court's grant of summary judgment to defendants Government Employees Insurance Company ("Government Employees"), GEICO General Insurance Company ("GEICO General"), and GEICO Indemnity Corporation ("GEICO Indemnity").[6] These are affiliated companies, all of which are subsidiaries of the GEICO Corporation and are referred to collectively by the parties as the "GEICO Companies." We sometimes refer to that group of companies by that designation and sometimes simply as GEICO.

Unlike Hartford Fire, the GEICO Companies concede that adverse actions can occur with respect to the first rates charged in an initial policy of insurance. They do not assert that in order for an adverse action to occur there must be an increase to a rate that the consumer has previously been charged. Nevertheless, the district court granted summary judgment with respect to the various GEICO entities on a number of different grounds. First, the court held that Edo did not have standing to bring a FCRA claim against Government Employees because he "was not eligible for insurance coverage from [that company] regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel." Next, it granted summary judgment in favor of GEICO General because that company "did not contract with Plaintiff to issue or to underwrite an insurance policy." This ruling was in accord with the district court's previous

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6. Edo is not pursuing his appeal against GEICO Casualty Corporation ("GEICO Casualty"), a company that writes insurance policies for high risk consumers and charges the highest rates. GEICO Casualty did not issue a policy of insurance to Edo, and Edo did not seek to obtain a policy at the unfavorable rates the company charged.

holdings in other related cases that only the company that issues the insurance policy can be held to have taken an adverse action under FCRA. *See Ashby v. Farmers Group, Inc.*, 261 F. Supp. 2d 1213, 1222 (D. Or. 2003); *Razilov v. Nationwide Mut. Ins. Co.*, 242 F. Supp. 2d 977, 989-90 (D. Or. 2003). Finally, it granted summary judgment to GEICO Indemnity because "the premium charged to [Edo] by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history."

GEICO's Use of Credit Information

The GEICO Companies are organized by risk. GEICO General provides preferred policies with low rates for those who are lesser insurance risks. Government Employees also provides preferred policies, but only to government employees. GEICO Indemnity issues standard policies with mid-level rates for moderate risk consumers. Finally, GEICO Casualty issues non-standard policies with high rates for those who are greater risks. The GEICO Companies began using consumer credit reports in early 1999.

In order to purchase insurance, consumers call a toll-free number and talk to a GEICO sales counselor. The sales counselor is employed by Government Employees but works on behalf of all of the GEICO Companies. Indeed, all of the work of the GEICO Companies is performed by Government Employees workers, as the other companies do not have any employees. Upon learning that a customer wishes to purchase automobile insurance, the sales counselor elicits basic information and asks whether he may use the customer's

credit information when arranging for his policy. If the customer acquiesces, the sales counselor obtains the credit information in the form of an insurance score calculated by the data analysis firm Fair Isaacs from information supplied by Trans Union. Government Employees is the only GEICO company that has a contract with Trans Union and Fair Isaacs to provide this information. Using a Government Employees computer system, the sales counselor converts the insurance score to a credit weight and combines it with other weights assigned to other insurance factors, such as age and number of accidents to arrive at a final total insurance weight. Based on that final weight, the sales counselor assigns the customer to one of the GEICO Companies and determines the appropriate insurance tier. This determination serves to establish the rate the consumer will be charged. After the information the customer has provided has been verified, he is issued an insurance policy at that rate.

GEICO's Adverse Action Policy

The GEICO Companies' original FCRA policy, adopted in 1999, was to send adverse action notices to all consumers whose credit reports were used in making insurance decisions. Later that same year, GEICO changed its policy, at least in part to reduce costs. Instead of sending adverse action notices to everyone, GEICO developed a system for determining which actions it deemed adverse by comparing the rate charged to the rate that it would have charged had the credit information been "neutral."

GEICO's new system, however, did not comply with FCRA's requirements. The GEICO Companies' policy during

the period relevant to this case was to compare the consumer's actual company and tier placement (which, as described above, was based in part on his credit rating) with the company and tier to which he would have been assigned had a "neutral" credit weight been substituted for his actual credit weight when calculating the final total insurance weight. The GEICO Companies' "neutral" credit weight was defined, generally speaking, as the weight that reflected the average credit rating of all consumers. The GEICO Companies would calculate two final total insurance weights, using only one variable—the actual credit weight in one case, and the "neutral" credit weight in the other. Only if the final total insurance weight using the "neutral" credit weight would have resulted in the consumer's placement with a different company or in a different tier than that to which the consumer was actually assigned, and only if such different placement would have resulted in the consumer's being charged a lower rate, would GEICO Companies issue an adverse action notice. In other words, the GEICO Companies' policy was to refrain from sending a statutory notice if use of the consumer's actual credit information caused the applicant to be placed with an entity and in a tier that resulted in the charging of the same or a lower rate than the rate that he would have been charged had the calculation and the ensuing assignment been based on a "neutral" or average credit rating. Under this policy, even if the rate ultimately charged was higher than the rate to which the consumer would have been entitled had he had a more favorable credit rating, the statutory notice was not sent if use of the "neutral" and the actual credit data would have led to an assignment to the same entity and tier. Thus, it was *not* GEICO's policy to send adverse action notices to all consumers who would have been charged lower rates had they enjoyed a more favorable credit rating.

Appendix A

Edo's Insurance Application

Following Edo's call to GEICO's toll-free number, the sales counselor used the credit information he obtained to place its new customer with GEICO Indemnity. The GEICO Companies then applied its policy for determining whether an adverse action had occurred. GEICO calculated that, had the neutral credit weight been used instead of Edo's actual credit weight, the resulting final total weight would still have resulted in Edo's being placed with GEICO Indemnity. That Edo's placement, and the rate charged for his insurance, did not improve when the "neutral" weight was used is not surprising, as Edo's actual credit weight was better than average. Under its policy, however, the GEICO Companies did not issue him an adverse action notice.

It is uncontested that if the GEICO Companies had used the highest credit weight that a consumer could receive rather than the neutral credit rate to determine Edo's alternate placement, GEICO would have placed Edo with GEICO General, a preferred company, and offered him a lower insurance rate. In short, if Edo's credit information had been more favorable (even though it was already above average), he would have been charged less for his insurance. In 2002, the GEICO Companies changed its policy and began to issue adverse action notices whenever a report with more favorable credit information would have resulted in a lower insurance rate. Under the new policy, Edo would have received the statutory notice.

II. ANALYSIS

A. Initial Policies of Insurance

The principal question in this and a number of related cases[7] constitutes a matter of first impression: Does FCRA's adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged? As with all statutory interpretation, we begin with the text of the statute. *See, e.g., Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000). An adverse action with respect to insurance is defined by 15 U.S.C. § 1681a(k)(1)(B)(i) as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance."

Specifically, we must decide whether charging a higher price for initial insurance than the insured would otherwise have been charged because of information in a consumer credit report constitutes an "increase in any charge" within the meaning of FCRA. First, we examine the definitions of "increase" and "charge." Hartford Fire contends that, limited to their ordinary definitions, these words apply only when a consumer has previously been charged for insurance and that charge has thereafter been increased by the insurer. The phrase, "has previously been charged," as used by Hartford,

7. The related cases are resolved by memoranda of disposition filed concurrently herewith.

refers not only to a rate that the consumer has previously paid for insurance but also to a rate that the consumer has previously been quoted, even if that rate was increased before the consumer made any payment. Reynolds disagrees, asserting that, under the ordinary definition of the term, an increase in a charge also occurs whenever an insurer charges a higher rate than it would otherwise have charged because of any factor—such as adverse credit information, age, or driving record[8]—regardless of whether the customer was previously charged some other rate. According to Reynolds, he was charged an increased rate because of his credit rating when he was compelled to pay a rate higher than the premium rate because he failed to obtain a high insurance score. Thus, he argues, the definitions of "increase" and "charge" encompass the insurance companies' practice. Reynolds is correct.

"Increase" means to make something greater. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The action, process, or fact of becoming or making greater; augmentation, growth, enlargement, extension."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed.1988) (defining "increase" as "growth, enlargement, etc[.]"). "Charge" means the price demanded for goods or services. *See, e.g.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("The price required

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8. An adverse action under FCRA can, of course, only occur if the increase in charge was due to "information contained in a consumer report." 15 U.S.C. § 1681m(a). The consumer reports at issue in these cases are credit reports. While increases in charges may occur because of many factors, plaintiffs contest only the increases due to unfavorable credit information.

or demanded for service rendered, or (less usually) for goods supplied."); WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed. 1988) ("[T]he cost or price of an article, service, etc."). Nothing in the definition of these words implies that the term "increase in any charge for" should be limited to cases in which a company raises the rate that an individual has previously been charged.

While no court has considered whether an increase requires a previous charge within the meaning of FCRA, the Sixth Circuit has employed the term "increase" in an analogous circumstance, stating, "An increase in the base price of an automobile that is not charged to a cash customer, but is charged to a credit customer, *solely because he is a credit customer*, triggers [the Truth in Lending Act's] disclosure requirements." *Cornist v. B.J.T. Auto Sales, Inc.*, 272 F.3d 322, 327 (6th Cir. 2001). Defined in this manner, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price.

Second, the statutory definition of "adverse action," as it is made applicable to insurance, explicitly encompasses "*any* insurance, existing or applied for." 15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added). Congress' use of the latter phrase demonstrates its intent that "adverse actions" apply to all insurance transactions—from an initial policy of insurance to a renewal of a long-held policy. The text of the statute does not permit the imposition of any temporal limitation. Hartford has suggested no sensible alternative reading of "existing or applied for." Thus, reading the terms "increase" and "charge" in the context of the provision as a

whole, particularly the "existing or applied for" phrase, supports affording them their ordinary meaning.

Third, our interpretation of the terms at issue best comports with the stated purpose of FCRA: to ensure the "accuracy and fairness of credit reporting." 15 U.S.C. § 1681. FCRA's adverse action notice requirement is an important tool that Congress created, using broad, encompassing language. Through this requirement, Congress sought to promote the rights of consumers by giving them essential information about how their credit report is used, information that they could obtain in no other way. The information Congress mandated serves two important ends. First and foremost, once consumers possess this information they can check and correct any errors in their credit reports. This increases the chances that a consumer's financial stability will not be hampered by faulty credit information. It also improves the overall accuracy of credit reports, which facilitates the operation of our markets. Second, even when credit reports are accurate, informing consumers when their credit rating is hurting them in the marketplace gives them important information about the benefits of improving their credit rating in the future and may even assist them in learning how to do so.

Hartford Fire's contention that FCRA does not apply to the rate charged in initial insurance policies would seriously undermine Congress's clear purpose. The use of credit reports to help determine the rates to be charged for initial insurance policies is common. Moreover it is these policies that the economically unsophisticated are most likely to purchase. Congress did not create such strong protections for consumers

only to render them inapplicable in so critical a circumstance. Furthermore, as FCRA is a consumer protection statute, we must construe it so as to further its objectives. *Guimond v. Trans Union Credit Info. Co.*, 45 F.3d 1329, 1333 (9th Cir. 1995). While our interpretation is the plain one, this canon supports our result.

We hold that whenever because of his credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that Reynolds' policy was an initial one, and his rate was the initial rate charged, is of no consequence. Reynolds' rate was increased above that which it would have otherwise been because of his credit report. As the statute's text is clear, we need not resort to either the agency's interpretations[9] or the statute's legislative history. The district court erred in granting summary judgment to Hartford Fire on the ground that FCRA does not apply to the rate first charged in an initial policy.[10]

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9. We note that our holding is consistent with the Federal Trade Commission's interpretation of the statute. Because we find FCRA unambiguous, however, we reach our decision independently of, and do not defer to, the agency's interpretation. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

10. Although our discussion has principally related to initial insurance policies, our interpretation of "increase in any charge" is obviously not limited to a consumer's first policy. As we have explained, an increased charge is a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price. This definition applies equally to initial issues, amendments, and renewals of insurance policies.

Appendix A

B. What Constitutes An Adverse Action

The GEICO Companies contend that their method of determining which consumers were entitled to receive adverse action notices comported with FCRA, while Edo asserts that under GEICO's procedure numerous consumers who were charged increased rates because of their credit rating failed to receive the statutorily required notice. At the time Edo sought an initial insurance policy, it was GEICO's practice to send an adverse action notice to a consumer only if the use of his actual credit information resulted in his placement with an entity and tier that provided a higher insurance rate than the entity and tier to which he would have been assigned if "neutral" or average credit information had been used instead. In short, it was GEICO's policy to send adverse action notices only to some of the consumers who would have received more favorable rates had they enjoyed a better credit rating. Specifically, notices were sent only to those with below-average credit who would have been charged a lower rate for insurance had they received an average credit rating. GEICO contends that only in such circumstance has an adverse action occurred. GEICO is incorrect.

FCRA does not limit its adverse action notice requirement to actions that result in the customer paying a higher rate than he would otherwise be charged because his credit rating is worse than the average consumer's. Instead, it requires such notices whenever a consumer pays a higher rate because his credit rating is less than the top potential score. In other words, if the consumer would have received a lower rate for his insurance had the information in his

consumer report been more favorable, an adverse action has been taken against him.[11] Such is the case with Edo. Because Edo would have been placed with GEICO General instead of GEICO Indemnity and thus would have been charged a lower rate if his credit rating had been higher, an adverse action occurred and an adverse action notice was required under FCRA.[12] Under the GEICO formula, the fact that the credit rating Edo actually received was higher than the average rating did not mean that Edo would not be charged a higher rate than he would have been charged had he had an even better credit report, but it ensured that he would not receive an adverse action notice when he was charged that increased rate. The district court erred in granting GEICO Indemnity summary judgment on the ground that Edo's rate was not increased on the basis of his credit report.

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11. We note that the statute does not require an insurance company to issue an adverse action notice simply because a consumer does not get the best possible rate. If a better credit report would not have reduced the consumer's insurance rate, his credit report is not the cause of the higher price and therefore no adverse action based on a credit report has occurred.

12. Making a slightly different argument, at least rhetorically, the GEICO Companies also argue that the action they took against Edo was not adverse because he was placed in the same company that he would have been placed in had his credit information not been used. While this is a true statement, it is only so because if the consumer refuses to allow his credit information to be used, the sales counselor assigns the consumer the "neutral" credit weight. Therefore, the GEICO Companies' argument that the action was not adverse because it was the same as if no credit information had been used is functionally identical to its argument that the action was not adverse because it was not detrimental when compared to the result using a "neutral" credit rating. Thus, this argument fails as well.

Appendix A

C. "No Hit" Adverse Actions

Hartford Fire makes a separate argument as to why in Reynolds' case no adverse action was taken. Specifically, the company argues that no adverse action was taken against Reynolds "based in whole or in part on any information contained in a consumer report" within the meaning of 15 U.S.C. § 1681m(a). When Hartford Fire requested credit information about Reynolds, Trans Union did not possess the necessary information to generate an insurance score and transmitted this finding to the insurer. Reynolds was therefore considered a "no hit." *See* n. 5, *supra.* Because he was so designated, Reynolds was rendered ineligible for the premium rates available to AARP members with qualifying credit ratings, and, as a result, was charged a higher rate in his initial policies. Hartford Fire argues, however, that these were not adverse actions because, it contends, an "adverse action" occurs only if it is based on "information contained in a consumer report" and no such report was received with respect to Reynolds. We reject Hartford Fire's argument.

FCRA's definition of "consumer report" is broad. It unquestionably encompasses a credit reporting agency's communication to an insurance company that a consumer does not have enough information on file for an insurance score to be calculated. Specifically, 15 U.S.C. § 1681a(d)(1) explains that "the term 'consumer report' means any written, oral, or other communication of *any information* by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, [or] credit capacity . . . ." (emphasis added). Reporting that an agency cannot obtain any information regarding a consumer or that a consumer

has insufficient credit information on file conveys a message regarding the consumer's creditworthiness, standing, and capacity that makes his obtaining of credit far more difficult. Such a report suggests that the consumer cannot show that he pays debts in a timely manner. That information may be false: The credit agency may have used the wrong name or searched the wrong records, missing data that would have shown that the applicant is indeed creditworthy. Providing notice therefore serves the statutory purpose of allowing the consumer to correct errors in credit reports. Accordingly, we hold that a communication that a consumer has no information available or an insufficient credit history to permit the calculation of a credit rating qualifies as "a consumer report" within the meaning of FCRA. Because it is uncontested that Reynolds would have been charged lower insurance rates had he received qualifying credit ratings and because the application of the "no hit" rule precluded him from receiving such ratings, we hold that an adverse action was taken against him on the basis of information contained in a credit report. Accordingly, the district court's order of summary judgment may not be affirmed on the ground that its actions with respect to Reynolds were not based on such information.

D. Adequacy Of The Notice

Hartford Fire also urges us to affirm the district court's grant of summary judgment on the alternative ground that, although (in its view) it was not required under FCRA to send adverse action notices, the notices that the Hartford Companies did send were sufficient to meet its FCRA responsibilities. We reject this argument because the notices

were inadequate as a matter of law. Under 15 U.S.C. § 1681m(a)(1), a company that takes adverse action on the basis of a consumer report must "provide oral, written, or electronic notice of the adverse action to the consumer" as well as meet a number of other specific requirements.[13] While the term "notice of an adverse action" is not defined in the statute, we hold that, at a minimum, such a notice must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action.[14] *See Fischl v. General Motors Acceptance Corp.*, 708 F.2d 143, 150 (5th Cir. 1983) (requiring disclosure of "reliance on data contained in[a consumer's] credit report" when providing notice of an adverse action).

The notices Reynolds received did not comply with any of the above requirements. They did not tell him that any adverse action had been taken against him. They simply stated that "the Hartford's eligibility and pricing decisions are based

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13. The notice must also contain information regarding the consumer reporting agency. It must provide the name, address, and telephone number of the agency that provided the report, a statement that the agency did not make the adverse decision and is not able to explain it to the consumer, a statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the agency, and a statement setting forth the consumer's right to dispute directly with the agency the accuracy or completeness of any information in the report. *See* 15 U.S.C. § 1681m(a)(2)-(3); 16 C.F.R. § 698, App. H.

14. We do not decide whether a fuller description of what specific information was adverse is required as this question is not before us.

in part on consumer report(s) from a consumer reporting agency" and allowed him to make a written request in order to find out more. Reynolds was entitled to be informed that his rate for insurance was increased because of information in his credit report. He was also entitled to be told that Hartford Fire made the pricing decision and that Hartford PCIC and Hartford Midwest issued him policies at those higher rates. FCRA recognizes the difference between telling a consumer that his credit information *could* affect his insurance rate and that it *did* adversely affect his rate, and requires notice of the latter. We therefore reject Hartford Fire's alternative argument for upholding the district court's order.

E. Who Is Liable

The defendants all contend that only one company can be liable when an insurance policy contains an increase in rates—the issuing company. The plain text of the statute, as well as its purposes, are to the contrary. Here, we hold that all of the defendants are potentially liable under the statute.

FCRA requires that "any person" who takes an adverse action is liable. 15 U.S.C. § 1681m(a). The definition of "any" includes the plural. *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH (3d college ed.1988) ("one, a, an, or some; one or more without specification or identification"). With regard to insurance transactions, liability attaches whenever an adverse action is taken "in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). This broad "in connection with" language confirms that a variety of entities may be

liable. No provision in the statute nor comment in the legislative history suggests that Congress intended that only a single company be responsible under FCRA when a consumer is charged an increased rate for insurance. Therefore, the defendants find themselves in the difficult position of persuading us that Congress intended something different from what it wrote. We analyze their three arguments separately.

First, GEICO argues that the words "applied for" in the definition of adverse action, § 1681a(k)(1)(B)(i), demonstrate that only the issuing company is liable under the statute. On that basis, GEICO asks us to hold that Edo "applied for" insurance only with GEICO Indemnity because that was the company that issued him a policy. The argument is frivolous, both factually and legally. As a matter of fact, Edo did not apply to one company but instead requested insurance from the GEICO family of companies. He did not specifically ask to be placed with GEICO Indemnity, and the GEICO Companies did not interpret his telephone call as requesting a policy with that company in particular, as evidenced by the evaluation by Government Employees of his eligibility for a policy from several of the GEICO affiliates. That he was placed with GEICO Indemnity and not another GEICO entity was the result of a decision made by Government Employees personnel, not the result of a limited application by Edo. Thus, GEICO's argument has no basis in fact. Furthermore, as a matter of law, we refuse to turn the words "applied for" into a legal term of art that refers only t the issuing company. The clearest indication that Congress did not intend the words "applied for" to be used in such an unusual manner is that this interpretation would eliminate all potential FCRA

liability for denials of insurance. No one disputes that FCRA defines the term adverse action to include denials. 15 U.S.C. § 1681a(k)(1)(B)(i). However, under GEICO's interpretation, because a consumer has not "applied for" insurance unless a policy has been issued and because a company that denies insurance has not, by definition, issued a policy, adverse action notices would never be required for denials of insurance. This is manifestly contrary to the statute, as it would eliminate from its coverage an important set of actions that Congress clearly intended to subject to FCRA's requirements.

Second, all the defendants argue that "*takes* any adverse action" limits FCRA's adverse action notice requirement to companies that actually issue an insurance policy. We find no such limitation in the statute by virtue of Congress's use of the word "takes" or otherwise. 15 U.S.C. § 1681m(a). To the contrary, adverse action is defined far more broadly than just "issuance." 15 U.S.C. § 1681a(k). The statutory definition specifically includes denials and cancellations as well as increases in rates, and other unfavorable changes, whenever and by whomever made. The word "takes" neither adds to nor detracts from that definition. It describes the act of engaging in the conduct that gives rise to the notice requirement. As discussed below, all of the companies at issue here took "adverse actions," as that term is defined in the statute.

Third and finally, all the defendants argue that we should hold liable only the issuing company because holding several companies liable for FCRA violations arising out of the issuance or denial of a single application will result in

multiple, confusing adverse action notices, which would thwart rather than further FCRA's purpose. Such is not the case. Joint and several liability simply imposes the obligation on all of the affiliated companies responsible for taking an adverse action to ensure that the affected consumer receives a statutory notice describing the adverse affect of his credit report within that family of companies. Multiple notices are not required; a single notice from the companies involved identifying those companies and their respective roles will suffice.

Holding all the companies that take adverse action against a consumer jointly responsible for issuing a notice furthers FCRA's objectives. For example, joint responsibility substantially increases the prospect that an adverse action notice will be sent and that a customer who seeks to obtain insurance from a group of affiliated companies will be informed as to the manner in which his credit information adversely affected him. By imposing joint and several liability, Congress also improved the quality of information consumers receive, because each of the companies that takes an adverse action against the consumer must say so in the notice. We doubt that many consumers understand how a group of affiliated insurance companies operates or how consumers are assigned to specific entities within their overall structure. By having the organizations explain the actions each affiliated company took, Congress made it more likely that consumers would comprehend what transpired with respect to the increased cost of their policy.

On the basis of the record before us all three GEICO Companies and Hartford Fire may be held liable under FCRA,

as may the two other Hartford entities as to which leave to amend was denied.[15] Two of the GEICO Companies, working together, are responsible for increasing Edo's charge for insurance: Government Employees, which made the decision as to which of the GEICO family of companies would issue the insurance to Edo and, in so doing, determined that he would be charged at an increased rate, and GEICO Indemnity, which then issued the insurance policy at that increased rate. GEICO General is responsible because it denied Edo insurance for the reason that his credit rating was not sufficiently high. Hartford Fire, like Government Employees, made the critical rate-to-be-charged decision. It determined that, on the basis of Reynolds' credit report, he was not eligible for the lower rates afforded by its affiliates to the qualifying AARP members and that he would be charged for his insurance at a higher rate. Hartford Fire may therefore be held liable for increasing Reynolds' charges for insurance on the basis of his credit rating. Hartford PCIC and Hartford Midwest issued the policies to Reynolds at the increased rates determined by Hartford Fire, and may, accordingly, be held liable as well.

In sum, Government Employees, GEICO General, and GEICO Indemnity may be held jointly and severally liable

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15. While the parties do not agree on every issue of fact, we hold that on the record before us there is no issue of material fact as to whether (1) Government Employees and Hartford Fire made the decisions that increased Edo's and Reynolds' rates, respectively, (2) GEICO General denied Edo a policy, and (3) GEICO Indemnity issued Edo a policy at an increased rate. All of these actions were taken by the companies involved and all constituted "adverse actions" within the meaning of FCRA.

for failing to issue an adverse action notice to Edo. Likewise, Hartford Fire may be held liable for failing to issue a notice to Reynolds, and Reynolds may also properly state claims against Hartford PCIC and Hartford Midwest. Thus, Reynolds should be permitted to amend his claims on remand.

F. Meaning Of Willfully

Each of the defendants asks that we affirm the district court's grant of summary judgment on the alternative ground that, as a matter of law, its conduct was not willful. We must first define "willfully" as it appears in FCRA.[16] Interestingly, there is no legislative history to explain what Congress intended by the use of that term.

We begin by following all five of the other circuits that have addressed the issue of the mens rea that is required with regard to the *act* that allegedly violates FCRA and hold that the act must have been performed "knowingly and intentionally." *See Phillips v. Grendahl*, 312 F.3d 357, 370 (8th Cir. 2002); *Dalton v. Capital Associated Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Cousin v. Trans Union Corp.*, 246 F.3d 359, 372 (5th Cir. 2001); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Cushman v. Trans Union Corp.*, 115 F.3d 220, 226 (3d Cir. 1997). An act that is merely negligent is not willful. *See McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115

16. "Any person who *willfully* fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer" for actual or statutory damages, punitive damages, and reasonable attorney's fees. 15 U.S.C. § 1681n (emphasis added).

(1988) ("The word 'willful' is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent."). Additionally, we adopt the position of four of the five other circuits and hold that, although the act must be intentional, it need not be the product of "malice or evil motive." *See, e.g., Dalton*, 257 F.3d at 418 (holding that a plaintiff need not show malice or evil motive); *Cousin*, 246 F.3d at 372 (same); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Cushman*, 115 F.3d at 226 (same). *But see Duncan*, 149 F.3d at 429 (requiring " 'a motivation to injure' "). In this respect, for purposes of willfulness we distinguish civil from criminal liability. *See Bryan v. United States*, 524 U.S. 184, 191, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998) ("Most obviously [willfulness] differentiates between deliberate and unwitting conduct, but *in the criminal law* it also typically refers to a culpable state of mind." (emphasis added)).

Next, we address the more difficult question: What is the nature of the mens rea that is required with respect to the law? Here, we follow the Third Circuit. Specifically, we hold that as used in FCRA "willfully" entails a "conscious disregard" of the law, which means "either knowing that policy [or action] to be in contravention of the rights possessed by consumers pursuant to the FCRA or in reckless disregard of whether the policy [or action] contravened those rights." *Cushman*, 115 F.3d at 227. We adopt this holding for two principal reasons.

First, we believe that the Third Circuit's definition best comports with Supreme Court precedent. The Court has

consistently stated that willfulness for civil liability requires either knowledge or reckless disregard with respect to whether an action is unlawful. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993) (quoting *Thurston* and holding that, for an alleged civil violation of the Age Discrimination in Employment Act (ADEA), "willful" requires only a "'reckless disregard for the matter of whether its conduct was prohibited by the ADEA'"); *McLaughlin*, 486 U.S. at 134 n. 13 (using the *Thurston* definition of "willful" in interpreting the Fair Labor Standards Act); *United States v. Illinois Cent. R.R. Co.*, 303 U.S. 239, 242-43, 58 S. Ct. 533, 82 L. Ed. 773 (1938) (holding civil defendant's failure to unload a cattle car was "willful" because it showed a disregard for governing statute and an indifference to its requirements). The Court's rule with respect to civil cases differs from its rule in criminal proceedings. In criminal cases, actual knowledge of illegality is required for a willful violation of a criminal statute. *See Bryan*, 524 U.S. at 196 (requiring "knowledge that the conduct is unlawful" in a criminal case); *Ratzlaf v. United States*, 510 U.S. 135, 149, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994) (requiring proof that the criminal defendant "knew the structuring [of financial transactions] in which he engaged was unlawful"); *Cheek v. United States*, 498 U.S. 192, 201, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) (requiring proof that a criminal "defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating").[17]

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17. The Eighth Circuit has rejected the reckless disregard standard and requires actual knowledge with regard to the law. *Phillips*, 312 F.3d at 370 ("Wilful noncompliance under section

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Second, the Third Circuit's approach best furthers the purposes and objectives of the Act. It is fair and balanced; it is practical as well. It avoids the two extremes of excusing noncompliance even though the answer to a previously undecided question is objectively apparent and imposing liability notwithstanding a truly excusable inability to predict future developments in the evolving construction of a statute by the courts. It encourages companies that use consumer credit reports to make the necessary effort to inform themselves fully and fairly as to their statutory obligations and, as a result, to carry out the statutory mandate of ensuring that consumers are notified when their credit information has been used against them. Unlike the defendants' preferred definition, the Third Circuit's standard does not create perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to "issues of first impression." Because a reckless failure to comply with FCRA's requirements can result in punitive damages, insurance and other companies will more likely seek objective answers from their counsel as to the true meaning of the statute.

In sum, if a company knowingly and intentionally performs an act that violates FCRA, either knowing that the

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(Cont'd)

1681n requires knowing and intentional commission of an act the defendant knows to violate the law."). The Sixth Circuit has implied that actual knowledge is necessary. *Duncan*, 149 F.3d at 429 (suggesting that an actual belief of legality suffices to defeat willfulness liability under FCRA). The Eighth and Sixth Circuits, however, ignore *Thurston* and the cases that follow its reasoning.

action violates the rights of consumers or in reckless disregard of those rights, the company will be liable under 15 U.S.C. § 1681n for willfully violating consumers' rights. A company will not have acted in reckless disregard of a consumers' rights if it has diligently and in good faith attempted to fulfill its statutory obligations and to determine the correct legal meaning of the statute and has thereby come to a tenable, albeit erroneous, interpretation of the statute. In contrast, neither a deliberate failure to determine the extent of its obligations nor reliance on creative lawyering that provides indefensible answers will ordinarily be sufficient to avoid a conclusion that a company acted with willful disregard of FCRA's requirement. Reliance on such implausible interpretations may constitute reckless disregard for the law and therefore amount to a willful violation of the law.

Where, as here, at least some of the interpretations are implausible, consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive. *See Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 645 (9th Cir. 1993); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 409 (5th Cir. 1989) (stating that "seeking legal advice [does not] ipso facto establish[ ] the appropriate intent [willfulness]"). Whether or not there is willful disregard in a particular case may depend in part on the obviousness or unreasonableness of the erroneous interpretation. In some cases, it may also depend in part on the specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel. Because the parties did not have an adequate opportunity to explore the issue in the district court, we remand for further proceedings.

III. CONCLUSION

In conclusion, we hold that FCRA applies, *inter alia*, to the first rates charged in initial insurance policies. We also hold that FCRA requires insurance companies to send adverse action notices whenever they charge a higher rate for insurance, in initial policies or otherwise, because of the consumer's credit information, not simply when the consumer's credit rating is below-average. Furthermore, we hold that a communication that there is a lack of sufficient credit information regarding a consumer is a credit report within the meaning of FCRA. In addition, we hold that adverse action notices must communicate to the consumer that an adverse action based on a consumer report was taken, describe the action, specify the effect of the action upon the consumer, and identify the party or parties taking the action. With respect to which companies in a group may be liable under FCRA, we hold that a company that makes the rate-setting decision, a company that issues the insurance policy, and any company that denies insurance at a more favorable rate may be held jointly and severally liable, and that such companies may provide a single adverse action notice to consumers containing all of the requisite information. Finally, we adopt the Third Circuit's definition of "willfully": Reckless disregard is sufficient.

As a consequence of these rulings, we hold that the district court erred in granting summary judgment to Hartford Fire on the basis that increased charges for insurance in an initial policy do not constitute adverse actions, and in denying Reynold's request for leave to amend his complaint to add Hartford PCIC and Hartford Midwest for that same reason.

Likewise, we hold that the district court erred in granting summary judgment to GEICO Indemnity on the basis that the actions it took were not adverse and granting summary judgment to Hartford Fire, Government Employees, and GEICO General on the basis that only the issuer of insurance can be liable under FCRA. Next, we hold that summary judgment may not be granted on the alternative grounds that a transmission that a consumer has insufficient credit information to generate a score is not a credit report, or that Hartford Fire's adverse action notices were sufficient. In sum, we reverse the district court's grant of summary judgment with respect to all defendants in both *Edo* and *Reynolds*, reverse its denial of Reynolds' request to amend his complaint to add Hartford PCIC and Hartford Midwest, and remand to the district court for further proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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18. We note that on appeal, plaintiffs seek only a reversal of the grant of summary judgment to defendants, and do not request such a judgment on their own behalf. Although "a court has the power sua sponte to grant summary judgment to a non-movant when there has been a motion but no cross-motion," we decline to do so here. *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000).

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON DECIDED FEBRUARY 23, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. CV 02-678-BR

AJENE EDO,

Plaintiff,

v.

GEICO CASUALTY COMPANY, GEICO GENERAL INSURANCE COMPANY, GEICO INDEMNITY COMPANY, AND GOVERNMENT EMPLOYEES INSURANCE COMPANY,

Defendants.

February 23, 2004, Decided

OPINION AND ORDER

BROWN, Judge.

This matter comes before the Court on Defendants' Renewed Motion for Summary Judgment (# 105) and Renewed Motion to Strike Expert Declaration of Birny Birnbaum (# 121).

Appendix B

For the reasons that follow, the Court GRANTS Defendants' Renewed Motion for Summary Judgment and GRANTS Defendants' Renewed Motion to Strike Expert Declaration. Accordingly, the Court DISMISSES this action with prejudice.

BACKGROUND

This is another in a series of cases in which the plaintiffs have raised the issue of the duty of insurance companies to provide their insureds or applicants for insurance with notice of adverse actions pursuant to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681m(a). In the other cases, the Court has previously addressed many of the issues raised by Plaintiff in this case, including those relating to statutory construction of the relevant FCRA provisions. The Court, therefore, need not revisit those issues in this Opinion.[1]

The following facts relevant to the specific issues in this case are taken from the parties' Concise Statements of Fact and Responses thereto and are undisputed unless otherwise indicated.

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1. For instance, both parties set out in well-reasoned and thoughtful arguments their differing views regarding the appropriate statutory construction to be given to the FCRA provisions that are relevant to the issues before the Court, including lengthy recitations of the legislative history and interpretations of the statute by the Federal Trade Commission (FTC). This Court, however, previously addressed those arguments in related FCRA cases and concluded the legislative history and FTC interpretations do not contradict the Court's conclusions regarding the plain meaning of the relevant statutory provisions. *See, e.g., Razilov v. Nationwide Mutual Ins. Co.*, 242 F. Supp. 2d 977, 990-91 (D. Or. 2003); *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1314-18 (D. Or. 2003).

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Plaintiff sought automobile insurance from "GEICO." GEICO has four affiliated insurance companies, each of which is named as a defendant in this case. Plaintiff began the process of obtaining insurance by talking on the telephone to a GEICO sales counselor. During that process, the sales counselor advised Plaintiff that GEICO considers an applicant's credit history when it calculates and quotes a premium rate for the insurance requested. Plaintiff agreed to the use of credit information to determine the premium rate, if any, that would be quoted to him. Based on Plaintiff's credit history and other factors, GEICO calculated an insurance score for Plaintiff and GEICO combined it with a Computer Assisted Underwriting System (CAU). CAU "recommended" GEICO offer to Plaintiff a premium rate for an insurance policy to be issued by GEICO Indemnity Company. GEICO Indemnity subsequently offered a premium rate to Plaintiff, which Plaintiff accepted. GEICO Indemnity then issued an automobile insurance policy to Plaintiff. The premium rate that GEICO Indemnity offered to Plaintiff would have been the same regardless of the information contained in Plaintiff's consumer credit history.

Defendant Government Employees offers insurance only to federal, state, county, or municipal government employees or military personnel. Plaintiff was none of the above.

Generally, Defendant GEICO Casualty Company issues nonstandard insurance policies with premiums, terms, and conditions of insurance coverage that are less favorable to an insured than those offered by GEICO Indemnity.

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Generally, Defendant GEICO General Insurance Company underwrites and issues "preferred" insurance policies with premium rates, terms, and conditions that are more favorable to insureds than those offered by a "standard" insurer such as GEICO Indemnity. Plaintiff's consumer credit history had no impact on GEICO's decision to place Plaintiff's insurance policy with GEICO Indemnity rather than GEICO General.

DEFENDANTS' RENEWED MOTION TO STRIKE EXPERT DECLARATION OF BIRNY BIRNBAUM

In support of their Opposition to Defendants' Motion for Summary Judgment, Plaintiff filed a Declaration of proposed expert witness Birny Birnbaum.

In related FCRA cases, the Court previously ruled it would not consider Birnbaum's legal arguments or interpretations of the plain meaning of FCRA because his proposed Declaration does not contain material that is the proper subject of expert testimony. *See, e.g., Rausch v. The Hartford Fin. Svcs. Grp., Inc.*, 2003 U.S. Dist. LEXIS 25892, CV-01-1529-BR, 2003 WL 22722061, at *2 (D. Or. July 31, 2003). The Court adheres to that ruling and declines to consider Birnbaum's testimony. In any event, to the extent Birnbaum's Declaration contains factual information, it is not relevant to the issues before the Court. Accordingly, the Court did not consider any such information.

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DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

1. Standards.

Fed.R.Civ.P. 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show the absence of an issue of material fact. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002). In response to a properly supported motion for summary judgment, the nonmoving party must go beyond the pleadings and show there is a genuine issue of material fact for trial. *Id.*

An issue of fact is genuine "'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The Court must draw all reasonable inferences in favor of the nonmoving party. *Id.* A mere disagreement about a material issue of fact, however, does not preclude summary judgment. *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1389 (9th Cir. 1990). When the nonmoving party's claims are factually implausible, that party must come forward with more persuasive evidence than otherwise would be required. *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (citation omitted).

The substantive law governing a claim or a defense determines whether a fact is material. *Addisu v. Fred Meyer*,

Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). If the resolution of a factual dispute would not affect the outcome of the claim, the court may grant summary judgment. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001).

II. Fair Credit Reporting Act (FCRA).

Congress enacted FCRA for the stated purpose of requiring credit reporting agencies to adopt "reasonable procedures for meeting the needs of commerce for consumer credit, personal insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b). Although FCRA generally regulates credit reporting agencies, it also creates obligations for certain users of consumer credit information. In particular, 15 U.S.C. § 1681m(a) provides: "If a person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report," the person shall provide "notice of the adverse action to the consumer."

FCRA defines "adverse action" in relevant part as follows:

> The term "adverse action"—
>
> (A) has the same meaning as in section 1691(d)(6) of this title; and
>
> (B) means—
>
> (i) *a denial* or cancellation *of*, an increase in any charge of, or a reduction or other adverse or unfavorable change in the terms

> of coverage or amount of, *any insurance, existing or applied for, in connection with the underwriting of insurance.*

15 U.S.C. § 1681a(k)(1)(B)(i) (emphasis added).

III. Standing.

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). The three elements of standing are:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560 (ellipses and brackets in original; internal quotations and citations omitted). The plaintiff bears the burden of establishing these elements. *Id.*

In response to a summary judgment motion, the plaintiff cannot rest on mere allegations but must set forth by affidavit

or other evidence specific facts that will be taken to be true for purposes of the summary judgment motion. *Id.*

IV. Analysis.

The Court separately addresses Plaintiff's claims against the four Defendants:

a. Government Employees.

Plaintiff asserts Government Employees denied Plaintiff automobile insurance when it did not quote him a premium rate. Plaintiff further asserts Government Employees' denial was an adverse action that required it to provide Plaintiff with notice, which Government Employees did not do.

To trigger the notice requirements under FCRA, any adverse action must be based "in whole or in part on any information contained in a consumer [credit] report." 15 U.S.C. § 1681m(a). The evidence, however, establishes Plaintiff was not eligible for insurance coverage from Government Employees regardless of his consumer credit score because Government Employees offers insurance coverage only to government employees or military personnel. Plaintiff admits he was not a government employee or serving in the military when he applied for insurance with GEICO. Accordingly, the Court concludes Plaintiff has failed to establish he has standing to bring this claim against Government Employees.

In light of the above, the Court holds Government Employees is entitled to summary judgment as to Plaintiff's claims against it.

b. GEICO General.

Plaintiff brings a FCRA claim against GEICO General on the ground that GEICO General, like Government Employees, denied Plaintiff insurance coverage and failed to provide Plaintiff with notice of that adverse action. The record, however, reflects GEICO General did not contract with Plaintiff to issue or to underwrite an insurance policy.

This Court previously has held "the entity contracting with the policyholder is the only possible statutory taker of adverse action because only the contracting entity is capable of increasing the premium for or changing the terms of the insurance contract with the insured." *Rausch*, 2003 U.S. Dist. LEXIS 25892, [WL] at *1. In *Ashby v. Farmers Group, Inc.*, this Court addressed the relationship between the company that actually issued and underwrote the insurance (FICO) and the entity that established the process by which the premium rate quoted to an insured was determined (FGI):

> [A]s a matter of undisputed fact . . . FICO was the only entity that contracted with Plaintiffs, issued their policies, acquired the corresponding right to receive their premiums, and maintained the obligation to pay their claims of loss. As the entity that insured Plaintiffs, FICO also was the only entity capable of changing the terms of its insurance contract with Plaintiffs. For example, before FICO could increase the charge for such insurance, FICO had to offer its policyholders the proposed new rate. FGI's use of a rating system to determine the rate to charge was merely a process that preceded FICO taking adverse action by increasing a premium. Accordingly, the

> Court concludes FGI did not "take" any adverse action as an "insurer" when it made internal decisions and set rates that led to FICO taking its adverse actions against Plaintiffs.

261 F. Supp. 2d 1213, 1221 (D. Or. 2003). *See also Rausch*, 2003 U.S. Dist. LEXIS 25892, [WL] at *4-5; *Spano v. SAFECO Ins. Co. of Am.*, 215 F.R.D. 601, 606 (D. Or. 2003); *Razilov*, 242 F. Supp. 2d at 991. Similarly, GEICO General was not required to send Plaintiff a notice of adverse action.

Accordingly, the Court concludes GEICO General is entitled to summary judgment as to Plaintiff's claims against it.

c. GEICO Indemnity.

As noted, Plaintiff admits the premium charged to him by GEICO Indemnity would have been the same even if GEICO Indemnity did not consider information in Plaintiff's consumer credit history. Plaintiff, therefore, has failed to establish a genuine issue of material fact exists as to whether GEICO Indemnity took an adverse action against Plaintiff based "in whole or in part" on information in Plaintiff's consumer credit report.

Accordingly, the Court concludes GEICO Indemnity is entitled to summary judgment as to Plaintiff's claims against it.

d. GEICO Casualty.

Plaintiff admits the premium charged and the terms and conditions offered by GEICO Casualty are generally less favorable than the premiums charged and the terms and conditions offered by GEICO Indemnity. Plaintiff has not

presented any evidence that GEICO Casualty would have offered him a more favorable premium rate or more favorable terms and conditions than those offered to him by GEICO Indemnity even if GEICO Casualty had not based its premium rate calculation in whole or in part on information in Plaintiff's consumer credit report. The Court, therefore, concludes Plaintiff has failed to establish that GEICO Casualty's failure to offer him automobile insurance was an adverse action. In any event, GEICO Casualty could not have taken an adverse action against Plaintiff because GEICO Casualty did not contract to issue Plaintiff an insurance policy.

Accordingly, the Court concludes GEICO Casualty is entitled to summary judgment as to Plaintiff's claims against it.

CONCLUSION

For these reasons, the Court **GRANTS** Defendants' Renewed Motion for Summary Judgment (# 105) and **GRANTS** Defendants' Renewed Motion to Strike Expert Declaration of Birny Birnbaum (# 121). Accordingly, the Court **DISMISSES** this action **with prejudice**.

IT IS SO ORDERED.

DATED this 23rd day of February, 2004.

ANNA J. BROWN
United States District Judge

Appendix B

JUDGMENT

BROWN, Judge.

Based on the Court's Opinion and Order issued February 23, 2004, the Court **DISMISSES** this action **with prejudice**.

IT IS SO ORDERED.

DATED this 23rd day of February, 2004.

ANNA J. BROWN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING AND REHEARING EN BANC FILED APRIL 20, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-35695, 04-35279

JASON RAY REYNOLDS; MATTHEW RAUSCH,

Plaintiffs-Appellants,

v.

HARTFORD FINANCIAL SERVICES GROUP, INC.; HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

AJENE EDO,

Plaintiff-Appellant,

v.

GEICO CASUALTY COMPANY,

Defendant,

and

GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Subsidiaries of Geico corporation,

Defendants-Appellees.

Appendix C

Before: REINHARDT, BERZON, and BYBEE, Circuit Judges.

The panel has voted unanimously to deny the petitions for rehearing and rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for rehearing and rehearing en banc are denied. The mandate shall issue forthwith.

APPENDIX D — STATUTES INVOLVED

15 U.S.C. § 1681a (2000)

§ 1681a. Definitions; rules of-construction

* * *

(k) Adverse action.

(1) Actions included. The term "adverse action"—

* * *

(B) means—

(i) a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance;

* * * *

Appendix D

15 U.S.C. § 1681m (2000)

§ 1681m. Requirements on users of consumer reports

(a) Duties of users taking adverse actions on basis of information contained in consumer reports. If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person shall—

(1) provide oral, written, or electronic notice of the adverse action to the consumer;

(2) provide to the consumer orally, in writing, or electronically—

(A) the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and

(B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and

(3) provide to the consumer an oral, written, or electronic notice of the consumer's right—

(A) to obtain, under section 1681j of this title, a free copy of a consumer report on the consumer from the

consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60-day period under that section for obtaining such a copy; and

(B) to dispute, under section 1681i of this title, with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

* * * *

15 U.S.C. § 1681n (2000)

§ 1681n. Civil liability for willful noncompliance

(a) In general. Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Civil liability for knowing noncompliance. Any person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages sustained by the consumer reporting agency or $1,000, whichever is greater.

(c) Attorney's fees. Upon a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

15 U.S.C. § 1681o (2000)

§ 1681o. Civil liability for negligent noncompliance

(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure; and

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together

with reasonable attorney's fees as determined by the court. (b) Attorney's fees. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.